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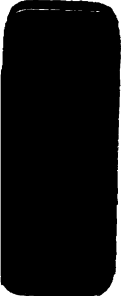
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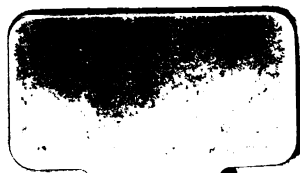
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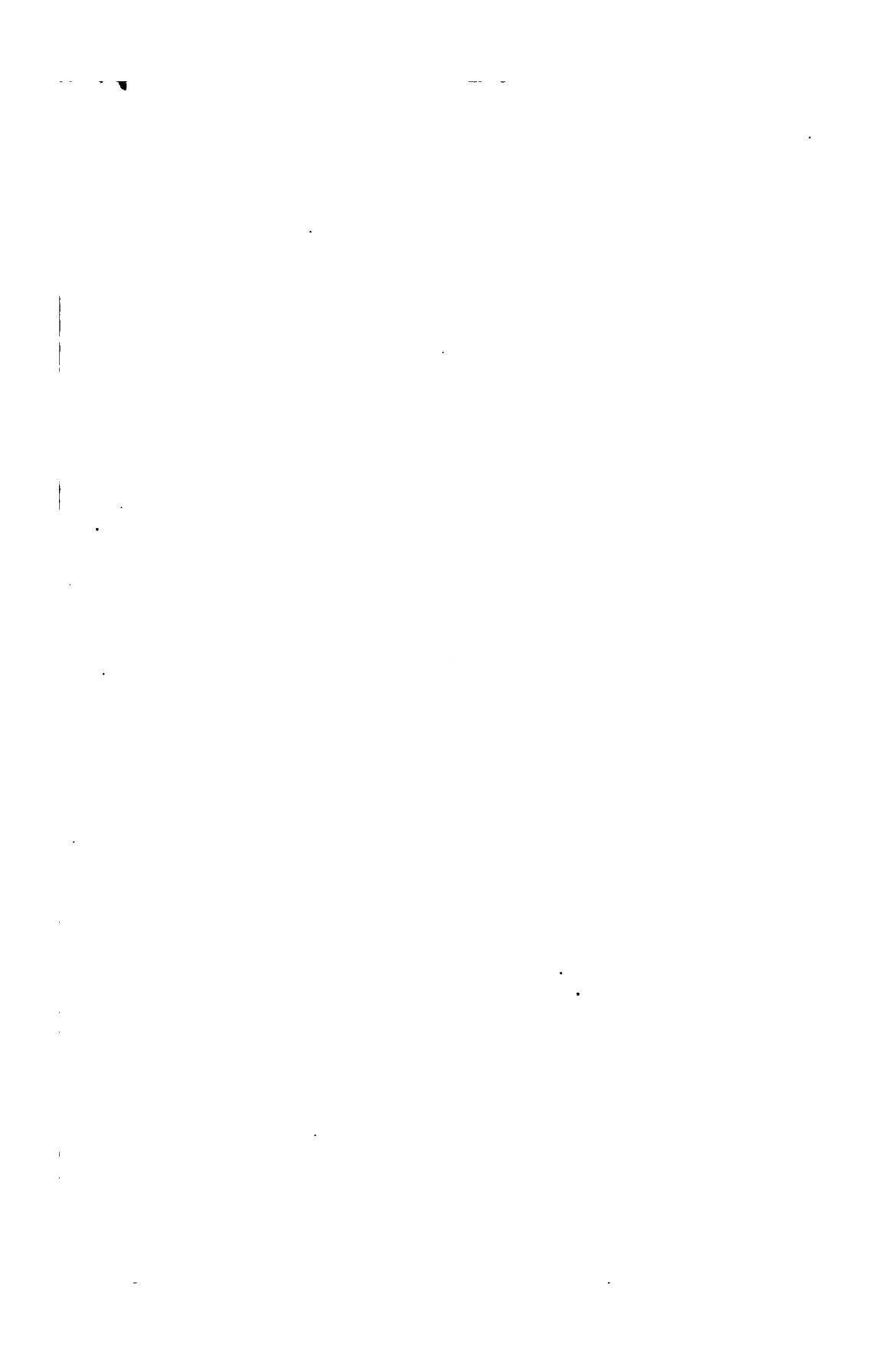




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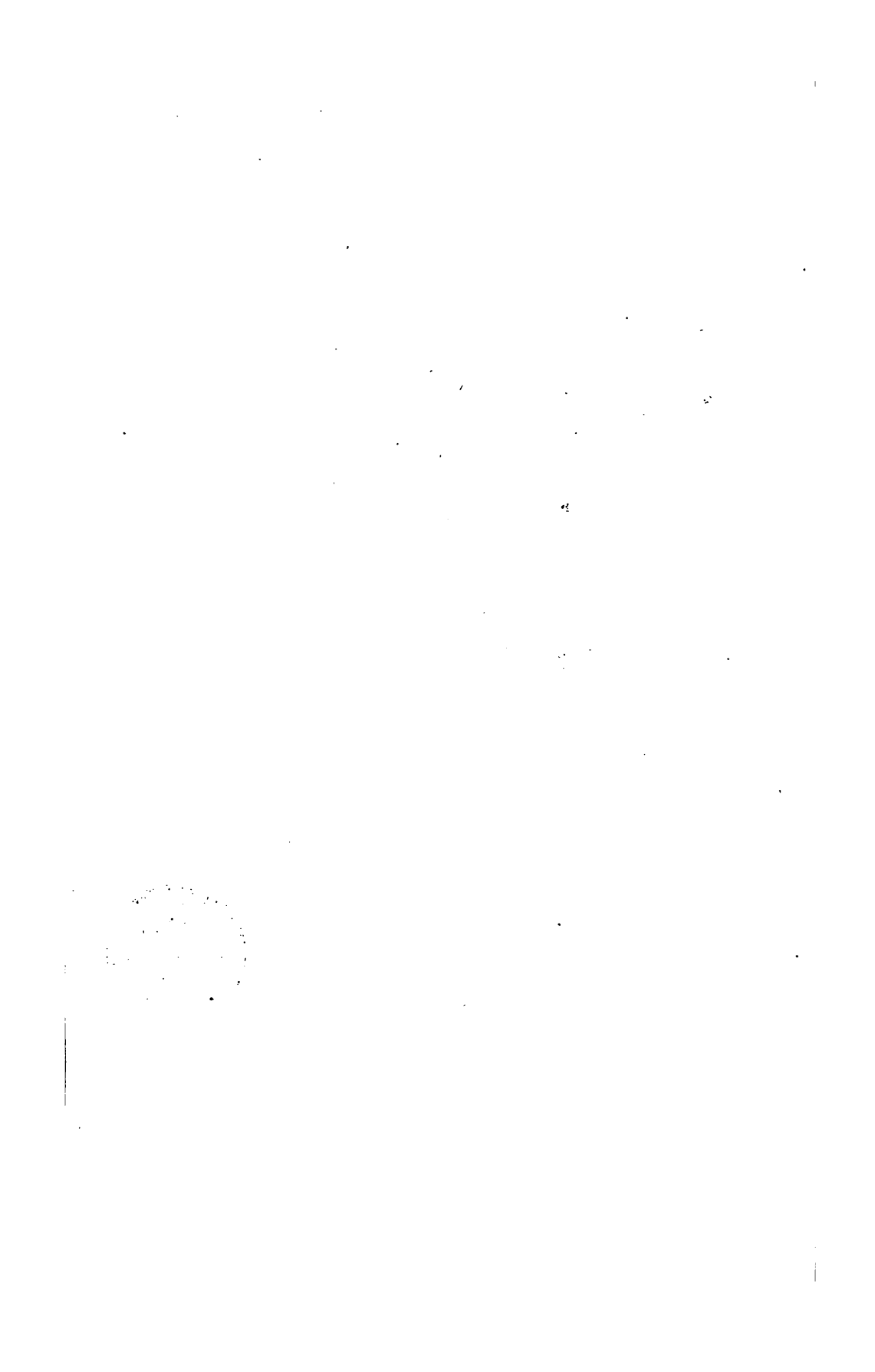




LAWS OF MARRIAGE

AND

DIVORCE.



AN EXPOSITION
OF THE
LAWS OF MARRIAGE
AND
DIVORCE,
AS ADMINISTERED IN THE
Court for Divorce and Matrimonial Causes,
WITH
THE METHOD OF PROCEDURE IN EACH KIND OF SUIT;

ILLUSTRATED BY COPIOUS NOTES OF CASES:

BY
ERNST BROWNING,
OF THE INNER TEMPLE,
BARRISTER AT LAW.

“—vitare, plagas in amoris ne iaciamur,
non ita difficile est quam captum retibus ipsis
exire et validos Veneris perrumpere nodos.”

Lucr.



LONDON:
WILLIAM RIDGWAY, 169, PICCADILLY. W.
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1872.

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COVENT GARDEN.

TO THE
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LORD PENZANCE,

JUDGE ORDINARY OF HER MAJESTY'S COURT FOR DIVORCE AND
MATRIMONIAL CAUSES,

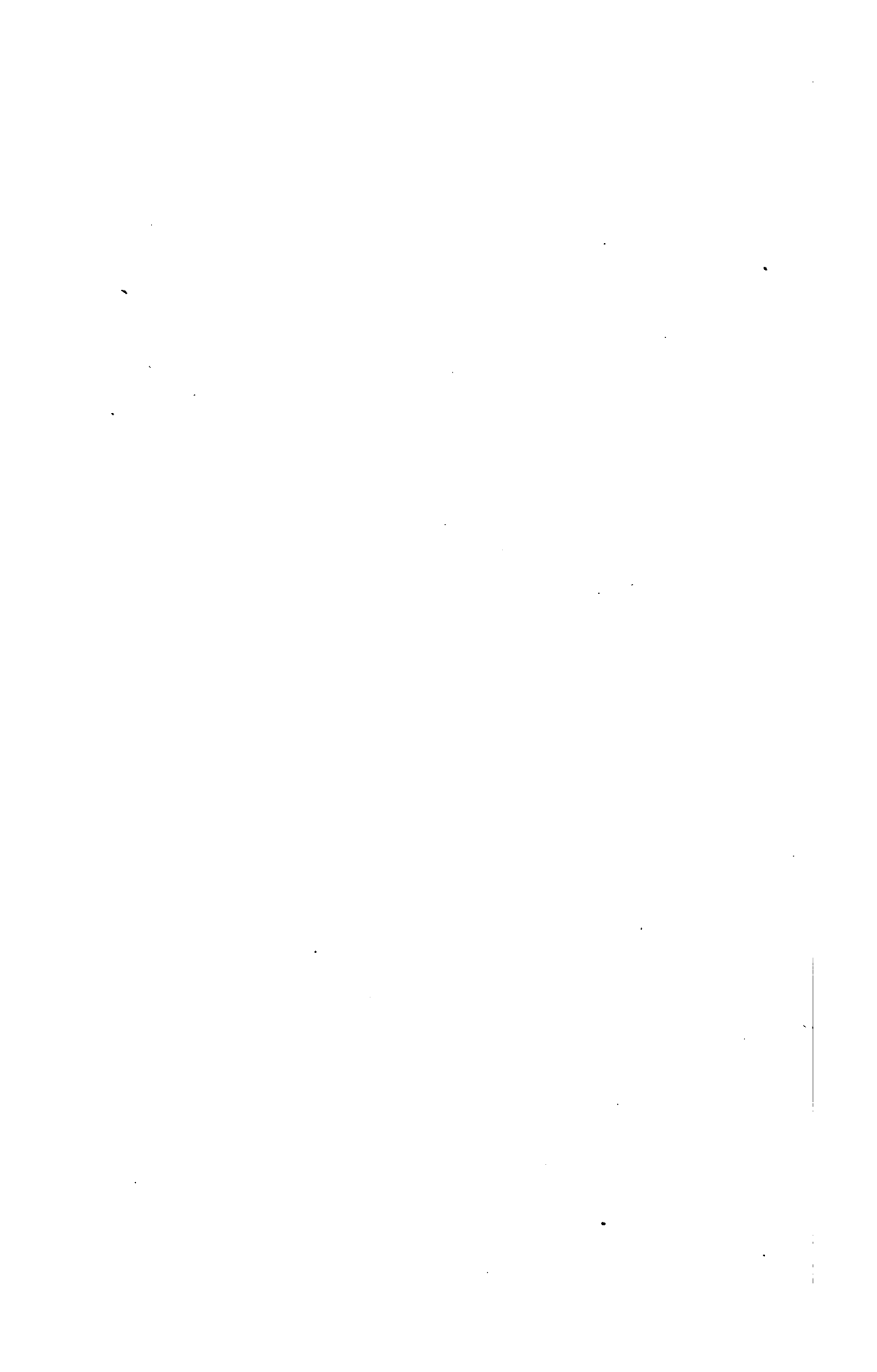
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IS BY HIS LORDSHIP'S PERMISSION

MOST RESPECTFULLY

Dedicated

BY

THE AUTHOR.



PREFACE.

THE important jurisdiction and extensive discretionary powers exercised by the Court of Divorce over its suitors, their property, and their children comprise the subjects I have here undertaken to treat.

As the plan of this work is somewhat novel, a few words of explanation may be required as to its general design.

In the Introduction, I have explained the constitution and general powers of the Court; and the technical procedure more or less common to all suits.

In the first chapter, I have stated the laws of marriage, the conflict of marriage laws, and the effect of the domicile of the parties in limiting the jurisdiction of the Court.

In the succeeding chapters, my design was to exhibit the law and procedure peculiar to each form of suit in such a manner as to make each subject as nearly as possible complete in itself.

In order to illustrate these various matters, I read and carefully abstracted all the reported cases material to my purpose ; and have set them out in the text or notes more or less fully as they appeared more or less valuable as decisions upon law or practice. To these I have added such remarks and notes as my personal experience and observation enabled me to supply.

The sections of the Divorce Acts material to the respective subjects are set out verbatim in the text or notes, and I therefore deemed it unnecessary to encumber the volume by printing those statutes in full.

In the Appendix will be found the Rules and Regulations, and the Forms authorized by the Court, to which I have added some notes and directions with respect to pleading.

I have thus attempted to supply what I believe to be an acknowledged want : whether I have accomplished or failed of my end, I can at least dismiss my work with the feelings of one who has endeavoured well.

5, *King's Bench Walk, Temple.*

May, 1872.

CONTENTS.

INTRODUCTION.

Constitution and Jurisdiction of the Court—Appellate Jurisdiction—Sittings of the Court—Sittings in Chambers—Power to make Rules—Registrars—View of the General Procedure in a Suit—Minors—Lunatics—Paupers—Order for Protection of deserted Wife's property and earnings
Page 1

CHAPTER I.

Marriage Law of England—Proof of Marriage—Foreign and Colonial Marriages—Conflict of Marriage Laws—Effect of Foreign Divorces—English Domicil the foundation of the right to sue
Page 29

CHAPTER II.

Of Suits for Dissolution of Marriage, and for Judicial Separation—Suit by the Husband—Co-respondent—Alleging Adultery—Evidence of Adultery—Identity of the Parties—Costs against Co-respondent; against Respondent—Damages—Wife's Suit—Incestuous Adultery—Bigamy with Adultery—Rape—Cruelty—Desertion
Page 60

CHAPTER III.

Defences in Suits for Dissolution of Marriage and for Judicial Separation—Statutable Provisions—Intervention by the Queen's Proctor—Absolute Bars: Connivance; Condonation; Collusion—Discretionary Bars: Petitioner's Adultery; Unreasonable Delay; Cruelty; Desertion or Wilful Separation; Wilful Neglect or Misconduct conducing to Adultery—29 Vict. c. 32, s. 2—Wife's Costs after Suit	Page 125
---	----------

CHAPTER IV.

Of Suits for Decrees of Nullity of Marriage—Impotency or Malformation—Grounds of Nullity under the Marriage Acts: Banns; Licence; Due Notice to Registrar—Insanity—Consanguinity or Affinity—Prior Marriage—Defences in Suits of Nullity—Costs	Page 181
--	----------

CHAPTER V.

Of the Suit for Restitution of Conjugal Rights—Defences—Suit for Jactitation of Marriage	Page 221
--	----------

CHAPTER VI.

Provision for Wife: Alimony pendente lite—Permanent Alimony on Sentence of Judicial Separation—Permanent Provision for the Woman on Decree of Dissolution of Marriage—Settlement of Damages	Page 228
---	----------

CHAPTER VII.

Settlement of Property to which a Wife is entitled in Possession or Reversion—Marriage Settlements—Costs	Page 254
--	----------

CHAPTER VIII.

Custody of Children—Custody of, or Access to Children pending the Suit: On final Decree; After final Decree—Intervention by third persons	Page 269
---	----------

CHAPTER IX.

Petition for Reversal of Decree of Judicial Separation—New Trial—Appeal to Full Court—Appeal to House of Lords— Right of Parties to marry again after Decree of Dissol- ution	Page 281
--	----------

CHAPTER X.

Procedure under the Legitimacy Declaration Act, 21 & 22 Vict. c. 93	Page 291
--	----------

APPENDIX.

Rules and Regulations—Forms—Table of Fees	Page 297
---	----------

CASES CITED.

A.

	PAGE
A. v. B.	182, 188
Abbott v. Abbott & Godoy	39
Adams v. Adams & Colter	76
Afford v. Afford	27
Alexander v. Alexander	226
——— v. ——— & Amos	68
Alexandre v. Alexandre	147
Allen v. Allen & D'Arcy	15, 132
Anderson v. Anderson	230
Angle v. Angle	144
Anichini v. Anichini	157
Ann Elliott, In the goods of	27
Anonymous	184, 218
Anquez v. Anquez	226
Anthony v. Anthony	93
Argent v. Argent	53
Astley v. Astley	66
Aughtie v. Aughtie	219

B.

B. v. B.	200
Babbage v. Babbage & Manning	69
Bacon v. Bacon	280
——— v. ——— & Bacon	19, 256
Badcock v. Badcock & Chamberlain	74
Bailey v. Bailey & Della Rocca	15
Balfour v. Carpenter	213
Bancroft v. Bancroft & Rumney	20, 76
Barker v. Barker	137, 138
Barlee v. Barlee	226

CASES CITED.

xi

	PAGE
Barnes <i>v.</i> Barnes & Beaumont	155, 273
—— <i>v.</i> —— & Grimwade	153
Bartlett <i>v.</i> Bartlett & Balmano	82
Basing <i>v.</i> Basing	124
Bawden <i>v.</i> Bawden	24
Baylis <i>v.</i> Baylis, Teevan & Cooper	175
Beamish <i>v.</i> Beamish	33
Beavan <i>v.</i> Beavan	15, 171, 237
Beeby <i>v.</i> Beeby	142, 144, 145
Bell <i>v.</i> Bell & Anglesea	80
Bellingay <i>v.</i> Bellingay & Thomas	253
Bent <i>v.</i> Bent & Footman	81, 249, 279
Best <i>v.</i> Best	108, 142, 160
Bevan <i>v.</i> M'Mahon	212
—— <i>v.</i> —— & Bevan	17, 206
Bird <i>v.</i> Bird	258, 267
—— alias Bell <i>v.</i> Bird	228, 233
Birt <i>v.</i> Boutinez	217
B. <i>v.</i> L. . . .	204
Blackborne <i>v.</i> Blackborne	225
Bland <i>v.</i> Bland	150
Boardman <i>v.</i> Boardman	96
Bond <i>v.</i> Bond	56, 57
Boreham <i>v.</i> Boreham	175
Borham <i>v.</i> Borham & Brown	64
Bostock <i>v.</i> Bostock	148
Boulting <i>v.</i> Boulting	140, 161, 284
Boulton <i>v.</i> Boulton & Page	129
Boyd <i>v.</i> Boyd & Collins	73, 279
Boynton <i>v.</i> Boynton	265, 267, 272, 276, 280
Bramwell <i>v.</i> Bramwell	101, 149, 225
Bray <i>v.</i> Bray	90
Brealy <i>v.</i> Reed	208
Bremner, ex parte	244
—— <i>v.</i> Bremner & Brett	73, 235
Briggs <i>v.</i> Morgan	199, 202
Broadwood <i>v.</i> Broadwood & St. Albans	12
Brodie <i>v.</i> Brodie	56, 58, 59
Brook <i>v.</i> Brook	47, 51

	PAGE
Brown v. Brown	90, 95, 202, 244
—— v. —— & Simpson	237
Bruere v. Bruere	231
Buckmaster v. Buckmaster	122
Burgess v. Burgess	65
Burroughs v. Burroughs	11, 19, 223
Burrows v. Burrows	235
Burt v. Burt	83

C.

C. v. C.	5
Callwell v. Callwell & Kennedy	80, 250, 260
Capstick v. Capstick	237
Cargill v. Cargill	124
Carryer v. Carryer & Watson	62
Carstairs v. Carstairs, Dickenson & others	75, 256
Cartlidge v. Cartlidge	273, 286
Castleden v. Castleden	196
Caton v. Caton	66
Catterall v. Catterall	41
Cavendish v. Cavendish & Rochefoucauld	256
Chambers v. Chambers	164
Charles v. Charles	245
Chaplin, in re	293
Cherry v. Cherry	19
Chesnutt v. Chesnutt	89, 98
Chetwynd v. Chetwynd	178, 265, 278
Chichester v. Donegal	56
—— v. Mure	290
Chisim's case	152
Churchill v. Churchill & Abbott	7
Ciucci v. Ciucci	96
Clark v. Clark & Bouck	252
—— v. —— & others	179
Clarke v. Clarke & Clarke	155
Clements v. Clements & Thomas	23
Clinton v. Clinton	244
Clout v. Clout & Hollebone	279

CASES CITED.

xiii

	PAGE
Clowes <i>v.</i> Clowes	166, 212
Cock <i>v.</i> Cock	116
Codrington <i>v.</i> Codrington & Anderson	20, 73, 274, 285
Coghill <i>v.</i> Coghill & Lauriero	8
Coleman <i>v.</i> Coleman	158
Collett <i>v.</i> Collett	95
Compton <i>v.</i> Bearcroft	50
Connelly <i>v.</i> Connelly	224
Conradi <i>v.</i> Conradi & Flashman	74, 180
— <i>v.</i> — & others	159
Conran <i>v.</i> Lowe	41
Constable <i>v.</i> Constable	280
Conway <i>v.</i> Beazley	52
Coodo <i>v.</i> Coodo	41
Cooke <i>v.</i> Cooke	15, 148, 163, 239, 275
— <i>v.</i> — & Allen	179
— <i>v.</i> — & Quaile	9, 17
Coombs <i>v.</i> Coombs	235
Cooper <i>v.</i> Cooper	78
Cope <i>v.</i> Burt	212
Corrance <i>v.</i> Corrance & Lowe	258, 267
Cotton <i>v.</i> Cotton & Kinnis	7
Coulthart <i>v.</i> Coulthart & Gouthwaite	167
Countess of Essex's case	188
Cousen <i>v.</i> Cousen	94
Cowing <i>v.</i> Cowing & Wollen	80
Cox <i>v.</i> Cox	153, 234
— <i>v.</i> —, Reade & Tobin	64
Crabb <i>v.</i> Crabb	120
Crampton <i>v.</i> Crampton & Armstrong	232
Crothers <i>v.</i> Crothers	221
Cudlipp <i>v.</i> Cudlipp	117
Cunnington <i>v.</i> Cunningham & Noble	171
Curtis <i>v.</i> Curtis	91, 144, 148, 271

D.

D. <i>v.</i> A.	191, 201
D'Aguilar <i>v.</i> D'Aguilar	29, 89, 99, 144, 145, 146

	PAGE
Dance v. Dance	144
Dart v. Dart	242
Davidson v. Davidson	65
Davis v. Davis & Hughes	169
— v. — & M'Carthy	256
Davis v. Davis	15
Deane v. Deane	7, 241
De Blaquiere v. De Blaquiere	243
Deck v. Deck	56, 57
Dempster v. Dempster	150
Dent v. Dent	149
Dering v. Dering & Blakeley	129, 174
Dickens v. Dickens	15
Diddear v. Faucit	210
Dillon v. Dillon	143, 174
Ditchfield v. Ditchfield	179
Dixon v. Dixon	78
Dobbyn v. Corneck	209
Dolby v. Dolby & Hewitt	69
Dolphin v. Robins	52
Dormer v. Williams	213
Drummond v. Drummond	129, 154 *
Duchess of Kingston's case	227
Duins v. Donovan	218
Dunn v. Dunn	142
Durant v. Durant	143, 146, 149, 239
Du Terreaux v. Du Terreaux	167
Dysart v. Dysart	88, 91
Drysdale v. Drysdale	177
— v. — & others	13

E.

E. v. T.	199
Eaton v. Eaton & Campbell	236
Elliott v. Gurr	216
Ellis v. Ellis & Smith	143
Ellyatt v. Ellyatt & others	179
— v. — Taylor & Halse	75, 286

CASES CITED.

XV

	PAGE
Evans v. Evans	84, 86, 148
— v. — & Bird	253
— v. — & Robinson	14, 15

F.

F. v. D.	191
Farquharson v. Farquharson	210
Faussett v. Faussett	66
Fellowes v. Stewart	209, 219
Ferrers v. Ferrers	143
Finney v. Finney	150
Fisher v. Fisher	247
Fitzgerald v. Fitzgerald	17, 121, 236
Fletcher v. Fletcher	236
Forster v. Forster	225
— v. — & Berridge	23, 55, 205, 252
— v. — & Evans	7
— v. — & Thomas	232
Forth v. Forth	111, 242
Frankfort v. Frankfort	240
Furlonger v. Furlonger	110
Fyler v. Fyler	15

G.

G. v. G.	184, 203
G. v. T.	189
Gale v. Gale	90
Gapp v. Gapp & Leverson	7
Garstin v. Garstin	55
Gatehouse v. Gatehouse	118
Geils v. Geils	89, 98
Gethin v. Gethin	284, 285
George v. George	235, 248
Gibson v. Gibson	119
Gill v. Gill & Hogg	260, 268
Gilpin v. Gilpin	133
Ginger v. Ginger	70

	PAGE
Gipps <i>v.</i> Gipps & Hume	135
Glennie <i>v.</i> Glennie & Bowles	131, 179
Goode <i>v.</i> Goode & Hamson	156, 165
Goodheim <i>v.</i> Goodheim & Frankinson	235
Graham <i>v.</i> Graham & Griffith	258, 267
Grant <i>v.</i> Grant	66
— <i>v.</i> — & others	266
Graves <i>v.</i> Graves	119, 173
Gray <i>v.</i> Gray	129
Green <i>v.</i> Dalton	209
Greenstreet <i>v.</i> Cumyns	187
Greenway <i>v.</i> Greenway	89
Guest <i>v.</i> Guest	199

H.

H. <i>v.</i> C.	194
Hadley <i>v.</i> Reynolds	208
Haigh <i>v.</i> Haigh	239
Haines <i>v.</i> Jeffell	217
Hall <i>v.</i> Hall	15, 92
Hamer <i>v.</i> Boreham	27
Hamerton <i>v.</i> Hamerton	66
Hancock <i>v.</i> Hancock & Smith	13
— <i>v.</i> Peaty	214, 215, 219, 220
Harford <i>v.</i> Morris	47
Harmar <i>v.</i> Harmar	240
Harris <i>v.</i> Harris	86, 173, 232, 233
— <i>v.</i> — & Lambert	151
— <i>v.</i> — & Milton	71
Harrison <i>v.</i> Harrison	160
Haswell <i>v.</i> Haswell & Sanderson	127, 168, 170
Haviland <i>v.</i> Haviland	237
Hawke <i>v.</i> Corri	227
Hawkes <i>v.</i> Hawkes	233
Hayward <i>v.</i> Hayward	20, 224, 231, 232, 233
Heal <i>v.</i> Heal	178
Hebblethwaite <i>v.</i> Hebblethwaite	70
Henslow <i>v.</i> Henslow & Beardsley	82

CASES CITED.

xvii

	PAGE
Herbert <i>v.</i> Herbert	89
Hick <i>v.</i> Hick & Kitchen	75
Hill <i>v.</i> Hill	112, 233, 284
Hindmarsh <i>v.</i> Hindmarsh & Hussey	72
Holden <i>v.</i> Holden	86, 92
Holmes <i>v.</i> Holmes	223
——— <i>v.</i> Simmons	213
Holt <i>v.</i> Holt & Davis	236
Hook <i>v.</i> Hook	63
Hooper <i>v.</i> Hooper	20
Hope <i>v.</i> Hope	222, 223
Horne <i>v.</i> Horne	83
Hudson <i>v.</i> Hudson	90
Hughes <i>v.</i> Hughes	176
Hulme <i>v.</i> Hulme	89
Hulse <i>v.</i> Hulse & Tavernor	160
Humphrey <i>v.</i> Williams	218
Hyde <i>v.</i> Hyde	243
—— <i>v.</i> —— & Woodmansee	49

J.

Jago <i>v.</i> Jago & Graham	235
James <i>v.</i> Biddington	80
Jeffreys <i>v.</i> Jeffreys & Smith	169
Jennings <i>v.</i> Jennings	230
Jessop <i>v.</i> Jessop	153
Jewell <i>v.</i> Jewell	86
Jinkings <i>v.</i> Jinkings	63
Johnston <i>v.</i> Parker	218
Jones <i>v.</i> Jones	96, 179, 238
Joseph <i>v.</i> Joseph & Wentzell	158

K.

Keats <i>v.</i> Keats & Montezuma	141, 142, 180, 249
Keech <i>v.</i> Keech	121
Kelly <i>v.</i> Kelly	102

	PAGE
Kempe <i>v.</i> Kempe	240
King <i>v.</i> King	67
Kirkman <i>v.</i> Kirkman	89, 110
Kisch <i>v.</i> Kisch	7
Knight <i>v.</i> Knight	94

L.

<i>L. v. H.</i>	197, 198
<i>Lait v. Bailey</i>	26
<i>Latham v. Latham & Gethin</i>	238
<i>Latour v. Latour & Weston</i>	128, 129, 154
<i>Latour [or Lautour] v. The Queen's Proctor</i>	128, 154
<i>Lawrence v. Lawrence</i>	114
<i>Leete v. Leete</i>	85
<i>Lempriere v. Lempriere & Roebel</i>	176
<i>Lewis v. Hayward</i>	198
<i>Limerick v. Limerick</i>	41
<i>Ling v. Ling & Croker</i>	266, 268
<i>Lloyd v. Lloyd</i>	72
— <i>v.</i> — & Chichester	151
— <i>v.</i> Petitjean	44
<i>Lockwood v. Lockwood</i>	87
<i>Lolley's case</i>	51, 52, 53
<i>Louis v. Louis</i>	242
<i>Loveden v. Loveden</i>	65
<i>Lovekin v. Edwards</i>	26
<i>Lovering v. Lovering</i>	135
<i>Lyne v. Lyne & Blackney</i>	80

M.

<i>M. v. B.</i>	196
<i>M. v. H.</i>	190
<i>Macartney v. Macartney</i>	83
<i>Macdonald v. Macdonald</i>	118
<i>Maclean v. Cristall</i>	43
<i>Madan v. Madan & De Thoren</i>	236
<i>Mallinson v. Mallinson</i>	112, 271
<i>Manning v. Manning</i>	59

CASES CITED.

xix

	PAGE
Manton <i>v.</i> Manton & Stevens	75
March <i>v.</i> March	83
— <i>v.</i> — & Palumbo	260, 262, 279, 280
Marris <i>v.</i> Marris & Burke	129, 131
Marsden <i>v.</i> Marsden	63
Marsh <i>v.</i> Marsh	90, 275
Matthews <i>v.</i> Matthews	163
Mayhew <i>v.</i> Mayhew	208
M'Kechnie <i>v.</i> M'Kechnie	38
Meara <i>v.</i> Meara	114
Meddowcroft <i>v.</i> Gregory	210
Mette <i>v.</i> Mette	48
Middleton <i>v.</i> Janverin	39
Midgeley <i>v.</i> Wood	209, 219
Miles <i>v.</i> Chilton	219, 228
Milford <i>v.</i> Milford	86, 276
Miller <i>v.</i> Miller	226
— <i>v.</i> — & Hicks	284, 285
Mills <i>v.</i> Mills	18
Milne <i>v.</i> Milne	7
— <i>v.</i> — & Fowler	78, 257
Milner <i>v.</i> Milner	100
Mogg <i>v.</i> Mogg	99
Molony <i>v.</i> Molony	223
Moore <i>v.</i> Moore	223, 241
Moorsom <i>v.</i> Moorsom	131, 132, 133, 134
Mordaunt <i>v.</i> Mordaunt & others	25
Morgan <i>v.</i> Morgan	166
— <i>v.</i> — & Porter	155, 157
Morphett <i>v.</i> Morphett	97
Mortimer <i>v.</i> Mortimer	67, 161
Mulock <i>in re</i>	22
Mycock <i>v.</i> Mycock	21
Mytton <i>v.</i> Mytton	240

N.

N. <i>v.</i> M.	186, 187, 188
Narracott <i>v.</i> Narracott & Hesketh	80, 250, 286

	PAGE
Neeld <i>v.</i> Neeld	148
Neil <i>v.</i> Neil	243
Nelson <i>v.</i> Nelson & Howson	73
Newman <i>v.</i> Newman	160
Newsome <i>v.</i> Newsome	82, 150
Nicholson <i>v.</i> Nicholson & Ratcliffe	238, 287
Noble <i>v.</i> Noble & Godman	158
Noblett <i>v.</i> Noblett & Kershaw	230
Nokes <i>v.</i> Nokes	232
Norris <i>v.</i> Norris, Lawson & Mason	75
Norton <i>v.</i> Seton	183
Nott <i>v.</i> Nott	116
Noverre <i>v.</i> Noverre	65, 67

O.

Oliver <i>v.</i> Oliver	89
Orme <i>v.</i> Holloway	209
— <i>v.</i> Orme	222
Otway <i>v.</i> Otway	99, 289

P.

P. <i>v.</i> S.	182
Pagani <i>v.</i> Pagani & Vining	217, 289
Palmer <i>v.</i> Palmer	149
Parkinson <i>v.</i> Parkinson	123
Parnell <i>v.</i> Parnell	24
Patch <i>v.</i> Patch	236
Paterson <i>v.</i> Russell	102
Patrickson <i>v.</i> Patrickson	40
Patterson <i>v.</i> Patterson & Graham	23, 81
— <i>v.</i> — & others	232
Paul <i>v.</i> Paul & Farquhar	264
Peacock <i>v.</i> Peacock	141
Pearman <i>v.</i> Pearman & Burgess	109, 165
Pearson <i>v.</i> Pearson	223
Peckover <i>v.</i> Peckover & Jolly	8
Pellew <i>v.</i> Pellew & Berkeley	160
Perrin <i>v.</i> Perrin	60
Peters <i>v.</i> Peters & Willett	63

CASES CITED.

xxi

	PAGE
Phillips <i>v.</i> Phillips	11, 180, 184, 182
—— <i>v.</i> —— & Medlyn	230
Picken <i>v.</i> Picken & Simmonds	71
Pitt <i>v.</i> Pitt	53, 62
Pollack <i>v.</i> Pollack & others	18
Pollard <i>v.</i> Wybourn	185
—— <i>v.</i> Pollard & Hemming	18
Pomfret <i>v.</i> Pomfret	239
Popkin <i>v.</i> Popkin	67, 94
Porter <i>v.</i> Porter & Jaggard	63
Portsmouth (Earl of) <i>v.</i> Portsmouth (Countess of)	215, 228
Pouget <i>v.</i> Tomkins	207
Pounsford <i>v.</i> Pounsford & Bulpin	81
Power <i>v.</i> Power	90
Prichard <i>v.</i> Prichard	110, 242
Priske <i>v.</i> Priske & Goldby	73
Pritchard <i>v.</i> Pritchard & Bean	81
Proctor <i>v.</i> Proctor & others	166
—— <i>v.</i> —— Smith & Pitman	168

Q.

Quicke <i>v.</i> Quicke	63
-----------------------------------	----

R.

Ratliffe <i>v.</i> Ratcliffe & Anderson	56, 160, 248
Ravenscroft <i>v.</i> Ravenscroft & Smith	130
Rawlins <i>v.</i> Rawlins	248
Reeves <i>v.</i> Reeves	92, 166, 172
Rex <i>v.</i> The Inhabitants of Billingshurst	205
—— <i>v.</i> The Inhabitants of Tibshelf	205
—— <i>v.</i> The Inhabitants of Wroxton	205
Richardes <i>v.</i> Richardes & Jones	14
Rix <i>v.</i> Rix	65
Robinson <i>v.</i> Robinson & Lane	67
Robotham <i>v.</i> Robotham	269
Rogers, otherwise Briscoe <i>v.</i> Halmshaw	290
—— <i>v.</i> Rogers	180, 181, 183, 184
Rolt <i>v.</i> Rolt	180
Rooker <i>v.</i> Rooker & Newton	89, 71

	PAGE
Ross v. Ross	141
Rowbotham v. Rowbotham	8
Rowe v. Rowe	222
Rowley v. Rowley	11, 20
Ruding v. Smith	44
Ryder v. Ryder	271
Ryves v. The Attorney-General	293, 295

S.

S. v. E.	190
St. Paul v. St. Paul & Farquhar	174
Saunders v. Saunders	99, 243, 100
Scott v. Jones	187
— v. Scott	221, 223, 285
Scrimshire v. Scrimshire	39
Seatel [or Seatle] v. Seatel [or Seatle]	256
Seaver v. Seaver	222
Seddon v. Seddon & Doyle	75
Seller v. Seller	156
Serrell v. Serrell & Bamford	19
Seymour v. Seymour	270
Sharpe, <i>ex parte</i>	28
Shaw v. Gould	51, 53
— v. Shaw	18, 22
— v. The Attorney-General	53
Shedden v. Patrick	292, 294, 295
Sherwood v. Ray	206, 216
Shirley v. Wardrop	234
Sidney v. Sidney	247, 288
Simonin v. Mallac	50
Smallwood v. Smallwood	93
Smith v. Smith	8, 94, 116, 233, 239
— v. — & Millet	77
Smithe v. Smithe & Roupell	266, 268
Snow v. Snow	145
Snowball v. Snowball	14
Snowdon v. Snowdon	229
Somerville v. Somerville & Webb	180
Sopwith v. Sopwith	71, 178, 225

CASES CITED.

xxiii

	PAGE
Sparrow <i>v.</i> Harrison	187
Spering <i>v.</i> Spering	225
Spratt <i>v.</i> Spratt	26, 272
Squires <i>v.</i> Squires	86, 95
Stace <i>v.</i> Stace	223
Stagg <i>v.</i> Edgecombe	190
Stanhope <i>v.</i> Baldwin	207
Steed <i>v.</i> Steed	7
Stone <i>v.</i> Stone	135, 231
— <i>v.</i> — & Appleton	79, 284, 287
— <i>v.</i> — & Brownrigg	257, 259, 260, 268
Stuart <i>v.</i> Stuart	13
Studdy <i>v.</i> Studdy	138
Sugg <i>v.</i> Sugg & Moore	71
Suggate <i>v.</i> Suggate	15, 85, 101, 276
Sullivan <i>v.</i> Sullivan	138, 166, 210
Swatman <i>v.</i> Swatman	94
Swift <i>v.</i> Swift	226
Sykes <i>v.</i> Sykes & Smith	260
Symons <i>v.</i> Symons & Pike	77

T.

T. <i>v.</i> D.	179, 192
T. <i>v.</i> M.	204
Taverner <i>v.</i> Ditchford	218
Tavernor <i>v.</i> Ditchfield	192
Taylor <i>v.</i> Taylor	108
— <i>v.</i> — & Wolters	252
Teagle <i>v.</i> Teagle & Nottingham	78
The Queen <i>v.</i> Chadwick	216
— <i>v.</i> Clarke	272
— <i>v.</i> Howes	271
— <i>v.</i> The Inhabitants of Brighton	82, 216, 217
— <i>v.</i> Millis	32, 43
Thomas <i>v.</i> Thomas	139, 258
Thompson <i>v.</i> Thompson	117
— <i>v.</i> — & Barras	261
— <i>v.</i> — & Johnson	231
— <i>v.</i> — & Sturmfields	272, 280

	PAGE
Todd <i>v.</i> Todd	152
Tollemache <i>v.</i> Tollemache	63, 160
Tomkins <i>v.</i> Tomkins	86
Tongue <i>v.</i> Allen	208
—— <i>v.</i> Tongue	208
Tooth <i>v.</i> Barrow	211
Tree <i>v.</i> Quin	209
Turner <i>v.</i> Meyers	214
—— <i>v.</i> Turner	146
Turton <i>v.</i> Turton	132

U.

U. <i>v.</i> F.	187
U. <i>v.</i> J.	193
Upton <i>v.</i> The Attorney-General	294

V.

Vivian <i>v.</i> Vivian & Waterford	23
---	----

W.

W. <i>v.</i> H.	202
Waddell <i>v.</i> Waddell	99, 150
Wait <i>v.</i> Wait & Flower	78
Wakefield <i>v.</i> Wakefield	210
Waldegrave Peerage case	44
Walker <i>v.</i> Walker	26
Wallscourt <i>v.</i> Wallscourt	101
Walton <i>v.</i> Ryder	227
Ward & Codd <i>v.</i> Dey	42
—— <i>v.</i> Ward	15, 116, 118, 244
Waring <i>v.</i> Waring	106
Warrender <i>v.</i> Warrender	49, 52, 225
Weber <i>v.</i> Weber & Pyne	233
Webster <i>v.</i> Webster & Mitford	261
Welde <i>v.</i> Welde	186
Wells <i>v.</i> Cottam	206
Wells <i>v.</i> Cottam <i>f. c.</i> Wells	15
—— <i>v.</i> Wells & Cottam	220
—— <i>v.</i> —— & Hudson	238

CASES CITED.

XXV

	PAGE
Wescombe <i>v.</i> Dods	227
West <i>v.</i> West & Parker	77
Westmeath <i>v.</i> Westmeath	87, 100, 143, 144, 148
Whieldon <i>v.</i> Whieldon	241
Whitcomb <i>v.</i> Whitcomb	56
White <i>v.</i> White	109, 242
Whitmore <i>v.</i> Whitmore	180, 238
——— <i>v.</i> ——— & Brettell	76
Wight <i>v.</i> Wight & Field	76
Wilkinson <i>v.</i> Wilkinson	215
Williams <i>v.</i> Dormer	56
——— <i>v.</i> Williams	68, 114, 118, 163, 229
——— <i>v.</i> ——— & Padfield	67
Wilson <i>v.</i> Brockley	210
Wilson <i>v.</i> Wilson	15, 128, 148
——— <i>v.</i> ——— & Howell	55, 56
Wilton <i>v.</i> Wilton & Chamberlain	169
Wiltshire <i>v.</i> Wiltshire	207
Wing <i>v.</i> Taylor	32, 216, 217
Winscom <i>v.</i> Winscom & Plowden	18, 69, 147
Winstone <i>v.</i> Winstone & Dyne	230
Wood <i>v.</i> Wood & Hutchins	9
——— <i>v.</i> ——— & Stanger	73
Woodgate <i>v.</i> Taylor	24
Woods <i>v.</i> Woods	217
Worsley <i>v.</i> Worsley	149
——— <i>v.</i> ——— & Wignall	259
Wright <i>v.</i> Elwood	208

X.

X. <i>v.</i> Y.	197
-------------------------	-----

Y.

Yeatman <i>v.</i> Yeatman	118, 170
——— <i>v.</i> ——— & Rummell	166
Yelverton <i>v.</i> Yelverton	40, 55, 57

Z.

Zycklinski <i>v.</i> Zycklinski	55
---	----

PRINCIPAL ABBREVIATIONS

USED IN CITING THE REPORTS.

Lee	.	.	Lee's Ecclesiastical Cases.
Consist.	.	.	Haggard's Consistory Reports.
Phill.	.	.	Phillimore's Reports.
Add.	.	.	Addams' Reports.
Hagg.	.	.	Haggard's Ecclesiastical Reports.
Curt.	.	.	Curteis' Ecclesiastical Reports.
Roberts.	.	.	Robertson's Ecclesiastical Reports.
Eccl. & Adm.	.	.	Spinks' Ecclesiastical and Admiralty Reports.
Deane	.	.	Deane & Swabey's Reports.
N. of C.	.	.	Notes of Cases in the Ecclesiastical Courts.
Moo. P. C. C.	.	.	Moore's Privy Council Cases.
H. of L. cas.	.	.	House of Lords Cases.
S. & T.	.	.	Swabey & Tristram's Reports.
L. J.	.	.	Law Journal, Probate & Matrimonial Reports.
L. R. P. & D.	.	.	Law Reports, Probate & Divorce.

INTRODUCTION.

Constitution and Jurisdiction of the Court—Appellate Jurisdiction—Sittings of the Court—Sittings in Chambers—Power to make Rules—Registrars—View of the General Procedure in a Suit—Minors—Lunatics—Paupers—Order for Protection of deserted Wife's property and earnings.

THE Court for Divorce and Matrimonial Causes owes its jurisdiction—in part original, and in part derived from the Ecclesiastical Courts—to the Act of Parliament by which it was created,¹ and to several Amendment Acts by which that jurisdiction has been in various ways altered and amplified.²

By the first mentioned Act³—which, for the sake of distinction, will throughout this work be referred to as “the Divorce Act”—all the jurisdiction which was then vested in or could be exercised by any Ecclesiastical Court or person in England

¹ 20 & 21 Vict. c. 85, which came into operation on the first day of January, 1858.

² 21 & 22 Vict. c. 93 (the Legitimacy Declaration Act); 21 & 22 Vict. c. 108; 22 & 23 Vict. c. 61; 23 & 24 Vict. c. 144; 25 & 26 Vict. c. 81; 27 & 28 Vict. c. 44; 29 Vict. c. 32; 31 & 32 Vict. c. 77.

³ Ss. 2, 6.

in respect of Divorces *a mensâ et toro*,⁴ suits of nullity of marriage, suits for restitution of conjugal rights, or jactitation of marriage, and in all causes, suits and matters matrimonial, together with the jurisdiction conferred by that Act, was transferred to the Court for Divorce and Matrimonial Causes.

Principles
of Ecclesi-
astical
Courts to
be acted
on.

By the 22nd section of the same Act, in all suits and proceedings other than proceedings to dissolve any marriage, the Court is to proceed and act and give relief on principles and rules which in the opinion of the Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this Act.

Judges.

The Judge of the Court of Probate⁵ was appointed and called the Judge Ordinary of the Court of Divorce, and was empowered to hear and determine all matters arising therein, except suits for dissolution of marriage and nullity of marriage,

⁴ Namely: separations "from bed and board" on the grounds of adultery or cruelty; and for which decrees for a "judicial separation" on the same grounds and having the same force and consequences, were substituted by the 7th section of the Divorce Act.

⁵ Appointed under section 5 of 20 & 21 Vict. c. 77 (the Probate Act). Sir Cresswell Cresswell took his seat as Judge of the Court of Probate and Judge Ordinary of the Court of Divorce, on the 12th January, 1858. On his death in 1863, he was succeeded by Sir James Plaisted Wilde, now Lord Penzance, who took his seat in the Court on the 3rd of November, 1863.

and certain technical matters;⁶ but the power then for the first time given to any Court—to decree a dissolution of marriage—was in the first instance intrusted to the Judge Ordinary sitting with two other Judges of the Superior Courts; and the tribunal thus constituted was called the Full Court.⁷ Subsequently, however, all the powers and authority of the Court were vested in the Judge Ordinary alone;⁸ and the Full Court now sits only occasionally for the purpose of hearing appeals from decisions of the Judge Ordinary in or relating to suits for judicial separation, petitions for alimony, custody of children, alteration of marriage settlements, rules for new trials; and arguments on such matters as he may deem expedient to be heard and determined with the assistance of two other Judges.⁹

Power of
the Judge
Ordinary.

⁶ Divorce Act, s. 9.

⁷ Divorce Act, s. 10. By the 8th section of that Act, the Lord Chancellor, the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, the Lord Chief Baron of the Court of Exchequer, the senior puisne Judge for the time being in each of the three last mentioned Courts, and the Judge of the Court of Probate were made Judges of the Divorce Court; and by 22 & 23 Vict. c. 61, s. 1, all the Judges for the time being of the Courts of Queen's Bench, Common Pleas and Exchequer respectively were made Judges of the Court; and by s. 3, the Judge Ordinary has place and precedence in the Court next after the Lord Chief Baron of the Court of Exchequer.

⁸ 23 & 24 Vict. c. 144, s. 1, or if he "deem it expedient, with the assistance of one other Judge of the Court."

⁹ 23 & 24 Vict. c. 144, s. 2.

Sittings of
the Court.

The 12th section of the Divorce Act provides that the Court shall hold its sittings at such place or places in London or Middlesex or elsewhere as her Majesty in Council shall from time to time appoint.¹ The sittings of the full Court are regulated by the 4th section of 23 & 24 Vict. c. 144, which enacts that such sittings shall be holden during the seventh and five following days of sitting in each Term, and on such other days as the Judge Ordinary with the assent of the Lord Chief Justices of the Courts of Queen's Bench and Common Pleas, and the Lord Chief Baron of the Court of Exchequer shall from time to time appoint; and the Judges of the Courts of Queen's Bench, Common Pleas, and Exchequer, shall, by a rota or otherwise as they deem most convenient, make provision for the attendance of the requisite number of such Judges to make with the Judge Ordinary a full Court during such sittings.

Sittings in
Chambers.

By 21 & 22 Vict. c. 108, the Judge Ordinary may sit in chambers for the despatch of such part of the business of the Court as can in his opinion with advantage to the suitors be heard in chambers; and such sittings shall from time to time be appointed by the Judge Ordinary, who, when so

¹ The Court has always held its sittings in the Lord Chancellor's Court at Westminster; and the Judge Ordinary sits there during and for a certain time after each Term, every week day except Mondays to hear causes, and on Tuesdays to hear motions in Court. Short undefended causes are also sometimes taken on Tuesdays.

sitting in chambers, exercises the same power and jurisdiction in respect of the business to be brought before him as if sitting in open Court.² The Judge may, and usually does sit *in camera* to hear suits for nullity of marriage, where the matters to be disclosed are unfit for the public ear; but he has no power to hear a suit for dissolution of marriage otherwise than in open Court.³

By the 53rd section of the Divorce Act, the Court shall make such rules and regulations concerning the practice and procedure under this Act as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same;⁴ and the 54th section gives the Court full power to fix and regulate from time to time the fees payable upon all proceedings before it.⁵

The registrars and other officers of the principal registry of the Court of Probate attend the sittings of the Divorce Court, and assist in the proceedings as directed by the rules and orders;⁶ and such

² Ss. 1, 3. The Judge usually sits in Chambers every Tuesday at 11 o'clock to dispose of summonses, and in Court at 12 to hear motions.

³ *C. v. C. L. R.* 1 P. & D. 640.

⁴ In December, 1865, the Judge Ordinary, by virtue of the powers conferred by 23 & 24 Vict. c. 144, s. 1, revoked the then existing rules and regulations, and made the rules and regulations now in force, and which took effect on the 11th January, 1866.

⁵ To be received, paid, and applied as therein directed, that is, by stamps, as to which, see ss. 60, 61 of the Divorce Act.

⁶ As to the duties of the Registrars, see Rules and Regulations *passim*, in Appendix.

registrars are invested with and exercise with reference to proceedings in the Court for Divorce and Matrimonial Causes the same power and authority which surrogates of the official principal of the Court of Arches could or might before the passing of 20 & 21 Vict. c. 77,⁷ have exercised in chambers with reference to proceedings in that Court.⁸

VIEW OF THE GENERAL PROCEDURE IN A SUIT.

Petition
and
Affidavit.

The proceedings in any suit are commenced by filing a petition,⁹ which must be accompanied by an affidavit¹ made by the petitioner, verifying the facts within the petitioner's personal cognizance, and deposing as to belief in the truth of the other facts alleged in the petition,² and such affidavit is to be filed with the petition; and where the suit is for dissolution of marriage or judicial separation, or for a decree of nullity of marriage, or a decree in a suit of jactitation of marriage, the affidavit is further to state that no collusion or connivance exists between the petitioner and the other party to the marriage.³ This verifying affidavit must

⁷ The Probate Act, of which see ss. 14, 15, 16 as to the Registrars.

⁸ Divorce Act, s. 14; 21 & 22 Vict. c. 108, s. 4.

⁹ Rule 1. See Form, No. 1, in Appendix.

¹ See Rules as to affidavits, 138 to 146 in Appendix.

² For instance, a wife petitioning on the grounds of cruelty and adultery may swear positively as to the cruelty, but as to the adultery, that she is informed and verily believes, &c.

³ Divorce Act, s. 41, Rules 2, 3.

not be headed in the cause, but merely "In the matter of the petition of ——" ⁴ In form, it should only repeat the statements in the petition, and is of no further use in the cause than to show that the petitioner is proceeding in good faith. ⁵ The petition having been filed, the next step is to extract a citation, ⁶ which, together with a certified ^{Citation and Service.} copy of the petition under seal of the Court, to be obtained from the Registry, ⁷ must be personally served on the parties cited when that can be done by personally delivering a true copy of the citation, and producing the original if required. ⁸ But it is provided that the Court may dispense with such

⁴ *Gapp v. Gapp & Levenson*, 4 S. & T. 273; *Steed v. Steed*, L. R. 1 P. & D. 364.

⁵ *Deane v. Deane*; *Forster v. Forster & Evans*, 1 S. & T. 90, 167. Care must be taken to spell the names of the respondents accurately, as in the event of a misnomer re-service of the petition or citation, as the case may be, may be necessary. *Cotton v. Cotton & Kinnis*, 4 S. & T. 275; *Kisch v. Kisch*, 33 L. J. 115. But a respondent who takes no steps in the course of the suit to set such a mistake right cannot ultimately take advantage of it to invalidate the proceedings. See *Churchill v. Churchill & Abbott*, L. R. 1 P. & D. 485, where a writ of attachment had been suspended on the application of Mr. William Braine Abbot, on the ground that all the proceedings had been served on him in the name of William Abbott.

⁶ Rules 8, 9, and Forms of Citation and Præcipe, Nos. 2 and 3 in Appendix.

⁷ See Rules 118 to 120, as to Office Copies.

⁸ Divorce Act, s. 42. Rules 10, 11, 12. Acceptance of service by an attorney will not suffice. *Milne v. Milne*, 4 S. & T. 183.

service altogether, or direct some other service to be substituted where it is necessary or expedient to do so;⁹ and therefore, if after all reasonable efforts, personal service cannot be effected, application may be made on motion,¹ supported by affidavits, to the Judge Ordinary, or in his absence, to the Registrars, to substitute some other mode of service,² and if it is satisfactorily shown that personal service "either within or without her Majesty's dominions" is practically impossible,³ substitutional service will be directed, or advertisements of the citation in the newspapers.⁴ In most cases, however, personal service can be effected, and the citation with a certificate of service endorsed thereon must then be returned into and filed in the Registry.⁵ The citation commands

⁹ Divorce Act, ss. 33, 42.

¹ See Rules as to motions, 147 to 150 in Appendix. All motions to the Judge Ordinary must be made in Court.

² Rule 13.

³ But not otherwise, as in *Rowbotham v. Rowbotham*, 1 S. & T. 73, where the citation was directed to be sent to New York, with instructions to endeavour to discover the respondent, who was believed to be residing there.

⁴ *Peckover v. Peckover & Jolly*, 1 S. & T. 219; *Smith v. Smith*, 3 S. & T. 216. The citation only is advertised, and not the petition, and the newspapers containing the advertisements must be filed in the Registry with the citation. Rule 15.

⁵ Rule 14. Form of certificate, No. 4 in Appendix. The Court may dispense with this rule, and direct the citation to be filed though not so endorsed; as it did in *Coghill v. Coghill & Lauriero*, L. R. 1 P. & D. 26, where the citation had been served on a foreigner at Shanghai and returned without endorsement.

appearance within eight days, but when it has to be served abroad, the time will be extended accordingly. The citation, whether personally served or not, must be returned into the Registry before the petitioner can proceed further;⁶ and if no appearance is entered within the time named in the citation, the petitioner may upon affidavit filed in the Registry of service and non-appearance, move the Court to direct the mode of trial without waiting for the expiration of the time (21 days) allowed for filing an answer.⁷ Generally speaking, however, it is not desirable to move for such directions until the time for answering has expired, and this has been the usual practice. Where there is no answer, the cause is heard before the Court itself.

Appearances are entered in the Registry in a book provided for that purpose, and an appearance may be entered at any time before a proceeding has been taken in default, or afterwards by leave of the Judge Ordinary, or of the Registrars in his absence, to be applied for on motion founded on affidavit;⁸ notice of the application being given to the other side.⁹ The party cited, called the

Appear-
ance.

⁶ *Cooke v. Cooke & Quail*, 2 S. & T. 50.

⁷ *Wood v. Wood & Hutchins*, L. R. 1 P. & D. 266. And see Rules 17, 18, and Form No. 5 in Appendix.

⁸ See Rules 19 to 22, and Form No. 6 in Appendix. If, for instance, the petitioner has not set the cause down for hearing, and will therefore not be delayed, the respondent may be allowed to appear and answer on an affidavit of having a good defence on the merits.

⁹ See Rules 113 to 117 as to Notices and service of them.

respondent,—which term must be understood to include co-respondent, wherever applicable—having entered an appearance, may within twenty-one days from the date of the service of the citation, file an answer in the Registry, and must on the same day deliver a copy to the petitioner's proctor or attorney.

Answer.

When the answer contains matter other than a simple denial of the facts stated in the petition—that is, when it sets up any charge or defence such as will be found explained hereafter¹—the respondent must file with the answer an affidavit verifying such additional matter in form similar to that required from a petitioner in support of a petition.² See ante, p. 6.

Reply.

Within fourteen days from the filing and delivery of the answer, the petitioner may file a reply, and the same period is allowed for any further or subsequent pleading, and copies of all such pleadings must on the same day that they are filed be delivered to the proctors or attorneys for the opposite parties.³ If either party desire to alter or amend the petition or any subsequent pleading, or to call upon the opposite party to make such alteration or amendment, the application must be made on motion in Court.⁴ The principle upon which

Amend-
ments.

¹ See Chap. III. Defences in Suits for dissolution of marriage.

² See Rules 28 to 31, and Form No. 7 in Appendix.

³ Rules 32, 33.

⁴ Unless the amendment be merely verbal, or in the nature of a clerical error, when it may be made on summons before the Judge Ordinary in chambers. Applications also for

amendments are allowed or ordered is that justice may be done between the parties by enabling them to bring before the Court all the facts necessary for determining the issues between them; and therefore a petition or answer may be amended by adding a fresh charge where the facts sought to be adduced are *noviter perventa*, and are brought forward *bond fide* and not for the purpose of harassing or delaying the other party.

But the Court is very unwilling to allow a charge to be added which from its nature must have been within the knowledge of the party on whose behalf the application is made at the time when the petition or answer was originally prepared.⁵

If the petition or answer be so framed as not to disclose legal grounds for the suit or defence, it may be demurred to, and on joinder in demurrer, the question raised will be argued before the Judge Ordinary; or he may direct it to be argued before the Full Court.⁶ Demurrers.

further particulars of any charge must be on summons and not on motion. See Rules 34 to 39; and as to Summonses, Rules 160 to 168.

⁵ In *Rowley v. Rowley*, 1 S. & T. 487, the wife was allowed to amend her petition by adding charges of cruelty, which from motives of delicacy she had suppressed; the Court being satisfied from her affidavit that she had reasonable grounds for her delay in making the charge, and that it was not brought forward for vexatious purposes.

⁶ *Burroughs v. Burroughs*, 2 S. & T. 303; *Phillips v. Phillips*, L. R. 1 P. & D. 169. Rule 67.

Mode of
trial.

On the pleadings being concluded, but not till then,⁷ the next step is to apply to the Court on motion to direct the mode of trial.⁸ This is usually done on behalf of the petitioner, but if he fail to do so, it may be done by the respondent.⁹ Either of the parties has the option of asking that the questions of fact raised between them may be tried by the Court itself, or by a special or common jury: but although the Court is generally willing to grant a jury, it is not obligatory upon It to do so, except in suits for dissolution of marriage.¹ Where damages are claimed, there must be a jury, although the respondents or either of them may not have appeared.²

Questions
for jury.

When the issues are directed to be tried by a jury, the questions of fact are to be briefly stated in writing by the petitioner, or, if he fail to do so, by either of the other parties to the cause, and settled by one of the Registrars,³ and copies of the questions so settled are to be delivered to each of the other parties, and, subject to any amendment or alteration, eight days after such delivery, the questions as finally settled are to be filed in the Registry by the petitioner—or if he fail to do so for one month after directions have been given for the mode of

⁷ *Broadwood v. Broadwood & St. Albans*, 34 L. J. 10.

⁸ Ante, p. 9, as to procedure where there is no answer.

⁹ See Rule 40 in Appendix.

¹ Divorce Act, ss. 28, 36.

² Divorce Act, s. 33.

³ Rules 41, 42, and Form No. 8 in Appendix.

trial—by either of the other parties,⁴ and at the same time the cause is to be set down as ready for trial, and notice given to each party for whom an appearance has been entered. In like manner, in cases to be heard by the Court itself, the petitioner, after obtaining directions as to the mode of hearing, or, failing the petitioner, either of the respondents entitled to be heard may set the cause down for hearing.⁵

Where cross-suits are instituted—as, for instance, where one party petitions for restitution of conjugal rights, and the other for dissolution of marriage—the Court may either order one of the suits to be stayed,⁶ or with the consent of the parties may order the two suits to be consolidated and tried as one; and this is the most convenient course, as the difficulties respecting the admission or rejection of the evidence as it applied to issues raised on the petition or on the answer, which rendered the double suit necessary, have been removed by the Evidence Further Amendment Act, 1869,⁷ making the parties to any proceeding instituted in consequence of adultery competent witnesses.

⁴ Or the respondent or co-respondent may take a rule nisi calling on the petitioner to show cause why the petition should not be dismissed. *Stuart v. Stuart*, 3 S. & T. 219; *Hancock v. Hancock & Smith*, L. R. 1 P. & D. 334.

⁵ Rules 43 to 47 in Appendix.

⁶ *Drysdale v. Drysdale & others*, L. R. 1 P. & D. 365, where the wife's suit for restitution was ordered to be stayed until after the trial of the husband's suit for dissolution.

⁷ 32 & 33 Vict. c. 68, s. 3.

Issue to
assizes.

Under the 40th section of the Divorce Act,⁸ the Court may, under extreme circumstances, direct the issues to be tried at the assizes, but, bearing in mind the wide discretionary power of the Court, there are many objections to such a course, and as the main object is the saving of expense, the Court will not in any case make such an order against the wishes of the husband, at whose cost the litigation is carried on.⁹

Wife's
costs pend-
ing suit.

On the assumption that the wife is without means, she is, whether petitioner or respondent, entitled to have her costs taxed against her husband before the hearing of the cause, in order that she may be provided with the means of prosecuting or defending the suit; and therefore upon the report of the Registrar, to whom the question is referred in the first instance,¹ the Court will, according to the circumstances, order the husband to

⁸ "It shall be lawful for the Court to direct one or more issue or issues to be tried in any Court of common law, and either before a Judge of Assize in any county or at the sittings for the trial of causes in London or Middlesex, and either by a special or common jury, in like manner as is now done by the Court of Chancery."

⁹ *Evans v. Evans & Robinson*, 1 S. & T. 216, where the application was rejected. *Richardes v. Richardes & Jones*, 30 L. J. 48, where the application on the part of the husband to have the issues tried in the country was granted on the ground of the great saving of expense. *Snowball v. Snowball*, L. R. 2 P. & D. 263, where the application on the part of the wife was refused.

¹ See Rule 158, and Form of Bond for securing a wife's costs, No. 21 in Appendix. As to taxation of Bills of costs, see Rules 151 to 157.

pay into the Registry or find security for a sufficient sum to meet the wife's costs of the hearing.² If, however, it can be shown that the wife has an independent income competent to her support, and the expenses of the suit, her privilege as to costs no longer continues.³

² See *Evans v. Evans & Robinson*, 1 S. & T. 330; 28 L. J. 137—*Ward v. Ward*, 1 S. & T. 484—*Dickens v. Dickens*, 2 S. & T. 103; 28 L. J. 94, as to costs incurred before the institution of the suit—*Suggate v. Suggate*, 1 S. & T. 497—*Allen v. Allen & D'Arcy*, 2 S. & T. 107; 30 L. J. 9—*Cooke v. Cooke*, 3 S. & T. 374; 33 L. J. 79, as to the principles of taxation of costs—*Bailey v. Bailey & Della Rocca*, 2 S. & T. 112, as to wife's costs of joining in a commission to examine witnesses abroad: and rule 137—The wife of a minor is entitled to have her costs taxed against the guardian of her husband where she is respondent in a suit for dissolution, *Beavan v. Beavan*, 2 S. & T. 652; but not where she was the respondent with her *de facto* husband in a suit instituted by the father of the husband, a minor, for nullity of marriage, *Wells v. Cottam f.c. Wells*, 3 S. & T. 364. In *Hall v. Hall*, 3 S. & T. 390, the husband having paid a sum into the Registry to meet the wife's costs, died before the cause came to hearing: the Court made an order for the taxation of the costs incurred for the hearing by the wife's solicitors and for the payment to them of such costs out of the fund in the registry, with leave to the solicitors of the husband's executors to attend the taxation.

³ *Wilson v. Wilson*, 2 Consist. 203, where the wife had a separate income of £440, and the husband only £400 a year for himself and family; *Davis v. Davis*, *ibid. in notis*, where the wife had £160 a year secured to her separate use, and the husband was an unbeneficed clergyman without any property or any certain income; in both cases the wives' costs pending suit were refused. These authorities have been followed, *Fyler v. Fyler*, Deane, 175; and the Court continues to act upon the principles there laid down.

Evidence
by affi-
davit.

The 46th section of the Divorce Act, enacting that the witnesses in all proceedings before the Court where their evidence can be had are to be sworn and examined orally in open Court, provides that parties shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall be subject to be cross-examined and re-examined orally in open Court.⁴ There must be some very peculiar circumstances to induce the Court to act on the above provision with respect to the principal issues: the matters allowed to be proved by affidavit will be stated under their respective subjects.

On Com-
mission.

By the 47th section of the Divorce Act, it is provided, that where a witness is out of the jurisdiction of the Court, or where by reason of his illness, or from other circumstances, the Court shall not think fit to enforce the attendance of the witness in open Court, it shall be lawful for the Court to order a commission to issue for the examination of such witness on oath, upon interrogatories or otherwise, or if the witness be within the jurisdiction of the Court, to order the examination of such witness upon oath, upon interrogatories or otherwise, before any officer of the said Court, or other person to be named in such order for the purpose.⁵

⁴ As to Evidence on Affidavit, see Rules 51 to 55.

⁵ See Rules 129 to 131 as to the immediate examination of a witness; and Rules 132 to 137 as to commissions for examination of witnesses; and Form of Commission No. 20 in Appendix.

As a general rule, orders for a commission or for the immediate examination of a witness are not made until issue has been joined, but subject to some exceptions, as where the questions are well understood, or the witness is dangerously ill.⁶ Sufficient notice of the examination must be given to enable the party against whom the evidence is to be tendered to have a reasonable opportunity of cross-examination.⁷ It is in the discretion of the Court to order a commission to be re-opened, so as to enable a witness who has been already examined to be examined again, but It will not make such an order merely on the representation that the witness forgot on the first examination to state material facts.⁸ When the evidence of persons permanently residing abroad has been taken under a commission, the presumption is that they remain abroad until the contrary is shown; but where a person is examined who is about to go abroad for

⁶ In *Cooke v. Cooke & Quail*, 2 S. & T. 50, where the only witnesses to the adultery relied upon were living in a brothel at Liverpool, and there was danger of their evidence being lost, the Court allowed a commission to issue for their immediate examination.

⁷ In *Fitzgerald v. Fitzgerald*, 3 S. & T. 397, notice was given about 2 p.m. on a Saturday to the respondent's solicitor in London that a witness was to be examined at Bath on Monday, under an order of the Court obtained by the petitioner. The witness died, and at the hearing, his deposition so taken was rejected on the ground that sufficient time had not been given to the respondent's solicitor to attend and cross-examine.

⁸ *Bevan v. M'Mahon & Bevan*, 2 S. & T. 55.

a temporary purpose; or on account of illness, proof of the absence from the jurisdiction or of the continuance of the illness is required.⁹

Inspection
of
documents
or letters.

Where either party is in possession of documents or letters material to the cause, an application may be made on summons supported by affidavit for the delivery or inspection of such documents or letters; and the Judge Ordinary will either order them to be produced for inspection, or direct them to be filed in the Registry with liberty to the party applying to take copies of such of them as the Judge Ordinary may think proper: unless the party against whom the application is made files an affidavit that he has no such letters, or that they contain no such matters as suggested.¹

Trial.

The cause having been set down for trial or hearing will come on in its turn unless the Judge Ordinary should otherwise direct.²

Right to
begin.

A question sometimes arises as to the right to

⁹ *Mills v Mills*; *Pollack v. Pollack & others*, 2 S. & T. 310.

¹ *Shaw v. Shaw*, 2 S. & T. 642; 31 L. J. 95; *Winscom v. Winscom & Plowden*, 3 S. & T. 383, *in notis*; *Pollard v. Pollard & Hemming*, 3 S. & T. 613.

² See Rules 47, 48, and Rule 50, as to the right of a respondent who has entered an appearance, but has not answered, to be heard in respect to costs or custody of children.

A list of causes to be heard during and after Term is printed at the beginning of each Term. The Court is always willing to take an undefended case out of its order to meet the convenience of parties whose witnesses have come from a distant part of the country, provided no inconvenience is caused to other suitors.

begin. The simple rule is that the affirmative must be proved before the negative, and the right to begin therefore devolves upon the party upon whom the substantive issue lies : as, in a suit for restitution of conjugal rights to which cruelty or adultery is pleaded, the respondent has the right to begin, because the matters alleged in the answer, if proved, put an end to the suit.³

With respect to the evidence to be adduced, it is only necessary here to state that the rules of evidence observed in the Superior Courts of Common Law at Westminster, are to be applicable to and observed in the trial of all questions of fact in the Court.⁴ The nature of the evidence required in each kind of suit respectively will be explained in its proper place.

Where, on the hearing of any cause, the evidence fails to satisfy the Court, It may from time to time adjourn the hearing, and may require further evidence if it shall see fit to do so;⁵ or the cause may be adjourned on various grounds at

Rules of
evidence.

Adjourn-
ment.

³ *Cherry v. Cherry*, 1 S. & T. 319 ; *Burroughs v. Burroughs*, 2 S. & T. 544 : this case is no longer in point. In *Bacon v. Bacon & Bacon*, 2 S. & T. 53, the wife in answer to her husband's suit for dissolution of marriage, did not deny the adultery, but pleaded certain countercharges : it was held that she ought to begin. In *Serrell v. Serrell & Bamford*, 2 S. & T. 422, the wife in answer to her husband's suit denied the adultery, and alleged his impotency : it was held that as she had traversed, though in an argumentative way, the marriage alleged by the petitioner, he had the right to begin.

⁴ Divorce Act, s. 48.

⁵ Divorce Act, s. 44.

the request of either of the parties, subject to any order as to costs caused by such adjournment.⁶

Compro-
mise.

If, at the hearing of a suit for dissolution of marriage or for judicial separation, the parties enter into an agreement for the withdrawing of the proceedings and the settlement of the suit by private arrangement, the Court will recognize such an arrangement, and will consider the parties bound by it; and will treat as a breach of faith any attempt to proceed in the suit, unless it can be shown that there was fraud or such error in the terms of the agreement that it ought not to be binding. But in a suit for restitution of conjugal rights, any compromise between the parties involving an agreement to live apart may be repudiated, and the Court will hear the suit.⁷

Dismissal
of petition.

Where the parties to a suit have become reconciled, or where the suit has abated by the death of either the petitioner or the respondent, application may be made to the Court on motion to dismiss the petition, subject to any order which may be asked for as to the costs incurred.

⁶ *Bancroft v. Bancroft & Rumney*, 3 S. & T. 610; 34 L. J. 31. *Codrington v. Codrington & Anderson*, 4 S. & T. 63; 34 L. J. 60, where an adjournment was granted on the ground of surprise at the instance of the respondent in respect of a charge of adultery with a person other than the co-respondent, on the understanding that the co-respondent should not be prejudiced as to costs by such adjournment.

⁷ See *Hooper v. Hooper*, 1 S. & T. 602, and on appeal to the Full Court, 3 S. & T. 251. *Rowley v. Rowley*, 3 S. & T. 338, and p. 347; affirmed on app. to H. of L. L. R. 1 Sc. & Div. App. 63. *Hayward v. Hayward*, 1 S. & T. 333.

Although a petitioner may have prayed for a dissolution of marriage, and at the hearing asks permission to alter the prayer to one for judicial separation, the Court will grant the application if no injustice can arise to the respondent, but if the respondent objects on the ground of having a defence, the Court will not alter the petition or the remedy sought until It has heard that defence.⁸

By the 52nd section of the Divorce Act, all decrees and orders to be made by the Court in any suit proceeding or petition to be instituted under authority of this Act, shall be enforced and put in execution in the same or the like manner as the judgments orders and decrees of the High Court of Chancery may be now enforced and put in execution. Under this provision, the modes of enforcing the decrees and orders of the Court are by writs of attachment, of *fiery facias*, or of sequestration.⁹

As imprisonment for mere inability to pay money is now abolished,¹ the Court cannot grant a writ of attachment against a person for not having complied with its orders in that respect, unless it can

⁸ *Mycock v. Mycock*, L. R. 2 P. & D. 98, where the wife petitioned for dissolution of marriage on the grounds of adultery and cruelty, and both charges were proved, but at her request the decree was suspended. A subsequent application by her for a judicial separation was opposed by the respondent, and the Court refused to allow the prayer of the petition to be altered until the respondent had had an opportunity of bringing before the Court the facts on which his opposition was grounded.

⁹ See Rules 110 to 112.

¹ 32 & 33 Vict. c. 62.

be shown that the person has the means of paying but will not.²

Attach-
ment for
contempt.

A writ of attachment may however be issued on other grounds; as for disobeying any order of the Court, or for interfering with, or in any way treating its procedure with contempt.

Intimidat-
ing suitor
or witness.

Threatening or attempting by letter or otherwise to intimidate a party to a suit or a witness, is a contempt of Court, which may be punished by fine or imprisonment, or both.³

Decrees
nisi and
absolute.

Previously to the passing of 23 & 24 Vict. c. 144, a decree in a suit for dissolution of marriage took effect immediately it was pronounced, and subject to an appeal to the House of Lords, the marriage was then and there dissolved; but by the 7th section of that statute it was enacted that every decree for a divorce should in the first instance be a decree *nisi*, not to be made absolute till after the expiration of three months from the pronouncing thereof—that is, the decree was to be good unless cause were shown against it by some person,⁴ or by the intervention of the Queen's Proctor, by reason of the decree having been obtained by collusion or by reason of material facts not brought before the

² The procedure is by summons before the Judge Ordinary in chambers.

³ *Shaw v. Shaw*, 2 S. & T. 517, where the husband, respondent, attempted to intimidate certain witnesses from giving evidence against him. *Re Mulock*, 3 S. & T. 599, where the Court imposed a fine of £300 on Mr. Mulock for sending a letter to Mrs. Chetwynd, threatening that if her petition were not withdrawn, he would issue a publication respecting her.

⁴ See Rules 70 to 76 as to showing cause against a decree.

Court—and this period of suspense was by 29 Vict. c. 32, s. 3, extended to six months. Intervention by third persons has been rare and not encouraging.⁵ Intervention by the Queen's Proctor will be explained in treating of Defences in Suits for Dissolution of Marriage, Chap. III.

Upon the expiration of the six months—assuming that no cause is shown to the contrary—application may be made on motion to the Judge Ordinary to make the decree absolute.²

⁵ See *Forster v. Forster & Berridge* (Graham intervening), 3 S. & T. 151, where a friend of the co-respondent intervened for the purpose of showing cause on the ground of material facts in the case not having been brought to the notice of the Court: most of those facts had been put on record by the parties, and were not established at the trial, and the intervener did not substantiate by his affidavits a single fact of importance: the Court declined to suspend its decree, and condemned the intervener in the costs occasioned by his intervention—*Clements v. Clements & Thomas* (Eames & Burroughs intervening), 3 S. & T. 394, where the Court declined to act upon the intervention, as it appeared to have been at the instance of the respondents—*Vivian v. Vivian & the Marquis of Waterford* (Leslie intervening), L. R. 2 P. & D. 100, where the intervener having filed affidavits setting out facts to induce the Court not to make the decree absolute, at the last moment withdrew his opposition, and the decree was made absolute: the Court held that It had no power to condemn him in costs.

In short, the best course for any private person wishing to intervene is to lay the facts before the Queen's Proctor.

⁶ As to the mode of application, see Rule 80, and Form of affidavit in Appendix, No. 12.

The Court cannot suspend the decree absolute on the ground that the petitioner has not paid his proctor's taxed costs. *Patterson v. Patterson & Graham*, L. R. 2 P. & D. 192,

MINORS—LUNATICS—PAUPERS.

Minors. Minors being incapable of acting in their own names must petition or appear by their guardians until they come of age ; except in the case of a minor who as an alleged adulterer is made a co-respondent : he may appear and defend without having a guardian assigned to him.⁷

Lunatics. The Committee of a lunatic husband may institute a suit for judicial separation on the ground of the wife's adultery, but not a suit for dissolution of marriage, for in the former case, the lunatic, if he recover, may nullify the proceedings by receiving his wife again ; whereas if a divorce were pronounced, the lunatic on recovery might find his wife married to another man, without the power to interfere. The Committee usually applies to the Lord Chancellor for authority to sue, but the Court has no power to require that he should do so.⁸

There is no instance of a suit on behalf of a lunatic wife, for she could hardly be injured by her husband's adultery under such circumstances.

A suit cannot be maintained against a lunatic wife on the ground of her adultery.⁹ In such a case,

⁷ See Rules 105 to 108.

⁸ *Parnell v. Parnell*, 2 Consist. 169 ; *Woodgate* (Committee of Taylor) v. *Taylor*, 2 S. & T. 512. In this case the suit was instituted under an order of the Lords Justices, the matter having been first referred to one of the Masters in Lunacy.

⁹ *Bawden v. Bawden*, 2 S. & T. 417.

where it is alleged that she is insane and incapable of pleading, the Court will appoint a guardian for the purpose of raising the question, and will direct the issue to be tried before a jury : And if it is found that at the time of the service of the citation in the cause, the respondent was in such a condition of mental disorder as to be unfit and unable to answer the petition and instruct an attorney for her defence, and has so remained, the Court will order that no further proceedings be taken in the suit until her mental capacity is restored.¹

The 58th section of the Divorce Act provides Paupers. that the Court may make such rules and regulations as It may deem necessary and expedient for enabling persons to sue *in formâ pauperis*.² With respect to these suits it has been said that the privilege of suing as a pauper—a privilege, however, of which persons do not often avail themselves—“ belongs only to the necessity arising from absolute poverty and from the absence of any other mode of obtaining justice: no person is entitled to the gratuitous labours of others who can furnish the means of providing them for himself: besides, it places the adverse party under great disadvantages; it takes away one of the principal checks upon vexatious litigation; the legal claim to so great a privilege ought therefore to be

¹ *Mordaunt v. Mordaunt & others*, L. R. 2 P. & D. 103 & 109. See the judgment of the Judge Ordinary in this case, at p. 125.

² See Rules 25 to 27.

clearly made out.”³ It is not because a person is in insolvent circumstances, or because he can conscientiously swear that he is not worth £25 after all his just debts are paid, that he is therefore entitled to proceed as a pauper, for otherwise many persons in the enjoyment of large incomes might be so entitled. On the principle above laid down, if it appears that the person claiming to sue as a pauper is possessed of property or income, or is capable by his business or profession of earning a livelihood, though it is possible that after payment of his just debts, he may not be worth the sum above named, he will not be considered entitled to gratuitous services in carrying on his suit; and if he has been admitted to sue *in formâ pauperis*, on proof of his having an income or of his ability to earn it, the decree by which he was admitted a pauper may be rescinded.⁴ A distinction must however be drawn between a skilled artisan, who if he chooses to work, has only to offer his labour and be employed, and a professional man who must wait till clients come to him.⁵

A person suing *in formâ pauperis*, who has had

³ *Lovekin v. Edwards*, 1 Phill. 183.

⁴ *Walker v. Walker*, 1 Curt. 560; *Lait v. Bailey*, 2 Roberts. 150.

⁵ *Walker v. Walker*, ut sup., where the husband was a skilled watchmaker, and capable of obtaining adequate employment and remuneration. *Spratt v. Spratt*, Deane, 276, where the husband was a surgeon, and having no patients, had no income.

counsel and attorney assigned to him cannot appear by another counsel.⁶

A wife suing as a pauper, if she obtains a decree is entitled to costs.⁷

PROTECTION OF DESERTED WIFE'S PROPERTY.

A woman deserted by her husband may at any time after such desertion apply to the Judge Ordinary in chambers⁸ for an order to protect any earnings or property which she may have acquired or become possessed of, or to which she may have become entitled as executrix administratrix or trustee since the date of the desertion, against her husband and his creditors and any person claiming under him. The order can only be in general terms, and not to protect any specific property, and is to state the time at which the desertion in consequence of which it is made commenced; and from the date and during the continuance of the desertion, the wife is to be treated in all respects as a single woman with regard to contracts and suing and being sued.⁹ The order being retrospective in its operation, any property acquired by the woman after the date of the desertion is her own and she may dispose of it by will.¹

Orders for
protection
of deserted
wife's
property.

⁶ *Hamer v. Boreham*, 1 S. & T. 26.

⁷ *Afford v. Afford*, 2 S. & T. 387.

⁸ See Rules 124, 125, and Form of Application, No. 19 in Appendix.

⁹ See the Divorce Act, s. 21; 21 & 22 Vict. c. 108, ss. 6, 7, 8, 9, 10.

¹ *In the Goods of Ann Elliott*, L. R. 2 P. & D. 274.

Discharge
of order.

Under the Divorce Act, the order could only be discharged by the Court or by the magistrate or justices by whom it was made,² and to remedy this inconvenience, it was enacted by 27 & 28 Vict. c. 44, that an order made by a magistrate or by the justices at Petty Sessions may be discharged by the successor of the magistrate by whom it was made, or by the justices at any later Petty Sessions, or by the Court.

² *Ex parte Sharpe*, 10 L. T. n. s. 458.

Applications by deserted wives for orders protecting their property or earnings are more commonly made to Police Magistrates, or Justices at Petty Sessions; and by s. 21 of the Divorce Act, every such order is, within ten days after the making of it, to be entered with the Registrar of the County Court, within whose jurisdiction the wife is resident.

CHAPTER I.

Marriage Law of England—Proof of Marriage—Foreign and Colonial Marriages—Conflict of Marriage Laws—Effect of Foreign Divorces—English Domicil the foundation of the right to sue.

ALL persons who stand in the relation of husband and wife in any way the law allows, as by a foreign marriage or by a domestic marriage not contrary to law, have a claim to relief on the violation of any matrimonial duty.¹ Therefore, although it is unimportant where the marriage may have been contracted, it is in the first place requisite to the institution of any matrimonial suit² that a fact of marriage can be proved to have taken place between the parties to it, for without that there can be no matrimonial offence.

First, with respect to marriages in England. Assuming that the parties are under none of the legal disabilities—to be considered hereafter in treating of suits for nullity of marriage—all persons of the age of 14 in males, and 12 in females may contract a marriage one with the other,³ accord-

¹ *D'Aguilar v. D'Aguilar*, 1 Hagg. 773.

² Except a suit for jactitation of marriage, as to which, see post under that head.

³ If either of them be under that age, the marriage is not void, but inchoate only and imperfect, and upon coming to the age of consent, they may disagree and declare the marriage void, or may agree to continue together, and then they need not be married again. Co. Litt. 79.

By the
Estab-
lished
Church.

Banns.

ing to the forms and ceremonies prescribed by the statutes.⁴ The principal marriage Acts now in force are 4 Geo. IV. c. 76,⁵ and 6 & 7 Wm. IV. c. 85; and the law and practice with respect to marriages under the provisions of these acts may be most conveniently stated under the division of :—1. Marriages by the Established Church; and 2. Other marriages.⁶

For the legal constitution of any marriage solemnized by the Established Church, it must be preceded either by the publication of banns upon three successive Sundays in the parish church or public chapel of the parish—or of each parish or chapelry, if more than one—in which the parties to be married “shall dwell;”⁷ or it must be author-

⁴ Except as between Quakers and Jews, who are respectively restricted to intermarrying with persons of their own persuasion or religion, no marriage in England is liable to be held void on any ground connected with the religious belief or persuasion of both or either of the parties.

⁵ By which the two previous Acts, 26 Geo. II. c. 33, (Lord Hardwicke's Act) and 4 Geo. IV. c. 17, were repealed.

⁶ From the year 1753, the date of Lord Hardwicke's Act, to 1836, the date of the Act 6 & 7 Wm. IV. c. 85, which first authorized marriages in registered buildings and before a registrar, the power of solemnizing lawful marriages, when the parties were neither Quakers nor Jews, was conferred by the Legislature upon the clergy of the Established Church only, and about seven-ninths of the whole number of marriages in England are still so solemnized. Report on Marriage Laws, 1868, p. vi.

⁷ The clergyman has no express power to call for or compel any information as to the age, kindred, history, or other circumstances of parties unknown to him; except that he may, if he think fit, require from them seven days' notice, with a

ized to be had without banns by a licence from the Ecclesiastical authority,⁸ or by a registrar's certificate.⁹

Of licences, there are two kinds: a common Licences. licence, which is granted by the ordinary of the place or his surrogate; and a special licence, which is granted only by the Archbishop of Canterbury.¹

A common licence may be obtained by any person who is prepared to make the requisite payment, and to declare on oath that one of the parties to be married has for the preceding fifteen days had his or her usual place of abode within the parish or district in the church or chapel of which the marriage is to be solemnized, and that there is no impediment of kindred or alliance or any other lawful cause known to the deponent; and if either party be a minor and has not been previously married—for widowers and widows are deemed emancipated—that the consent of the proper parent

statement of their names, places of abode within his parish or chapelry, and length of residence in such places of abode. 4 Geo. IV. c. 76, ss. 2, 7.

⁸ The Divorce Act, in abolishing the matrimonial jurisdiction of the Ecclesiastical Courts and persons, expressly excepts the power of granting marriage licences. Ss. 2, 6.

⁹ 6 & 7 Wm. IV. c. 85, ss. 1, 4; 1 Vict. c. 22, s. 36.

¹ And for which no fixed period of residence is necessary: it authorizes marriage at any hour of the day or night, and at any place whether consecrated or not. It is granted only on special grounds, and for a pecuniary payment so large as to be prohibitory to all who are not in affluent circumstances. On an average, about 12 special licences in the year are issued from the Faculty Office. Report on Marriage Laws, p. vii.

or guardian has been obtained, or that there is no person having authority to give such consent.²

A marriage founded on banns can only be solemnized in one of the churches or chapels in which the banns have been published; and a marriage by common licence, or by a clergyman under a registrar's certificate, must be solemnized in a church or chapel named in the licence or within the district of the registrar.

Every marriage by the Established Church must be celebrated by a duly ordained clergyman, and must take place between the hours of 8 and 12 in the forenoon;³ and be attested by two witnesses besides the officiating minister.⁴

It was settled by the celebrated case of *The Queen v. Millis*,⁵ that to constitute a valid marriage

² 4 Geo. IV. c. 76, ss. 10, 14, 16.

³ 4 Geo. IV. c. 76, s. 21. This limitation as to time is due to the 62nd Canon:—"Neither shall any minister . . . under any pretence whatsoever join any persons so licenced in marriage at any unseasonable times, but only between the hours of 8 and 12 in the forenoon;" (1 Cardwell, Synodalia, p. 282); and this limitation has been extended to marriages by banns and other marriages. The forenoon may have been thought a fitting time, on the principle that the bride and bridegroom when they make their matrimonial vow should do so *fasting*. Hence the wedding breakfast *after* the ceremony. A proper interval might be thought necessary between the religious ceremony and the carnal consummation.

⁴ In *Wing v. Taylor*, 2 S. & T. 278, it was held that a marriage was valid which was solemnized in a vestry belonging to and abutting on the church, and in the presence of one witness only.

⁵ 10 Cl. & Finn. 534.

by the common law of England, it must have been solemnized in the presence of a clergyman in Holy Orders; and by the case of *Beamish v. Beamish*,⁶ that a clerk in Holy Orders cannot effectually contract marriage without the presence of another clergyman: in other words, a clergyman cannot marry himself.

To those who prefer a purely civil ceremony—Marriages other than those by the Established Church. with the privilege however of superadding a religious service if they are so disposed—the law offers the alternative of marriage in the office of the superintendent registrar, or in a registered building.

The regulations made by 6 & 7 Wm. IV. c. 85, and the Acts passed for its amendment,⁷ provide that the officer called the superintendent registrar appointed for any district under the Act 6 & 7 Wm. IV. c. 86, passed for registering births, deaths, and marriages in England, shall also be the superintendent registrar of marriages in such district; and under these Acts there are two modes of celebrating marriage: upon the certificate or upon the licence of the superintendent registrar.

One of the parties intending to marry by registrar's Registrar's certificate. certificate must give notice to the superintendent registrar of the district, in which they must have dwelt for at least seven days, or if they dwell in different districts, then to the superintendent registrar of each district, accompanied by a solemn de-

⁶ 9 H. of L. Cas. 274.

⁷ 1 Vict. c. 22; 3 & 4 Vict. c. 72; 19 & 20 Vict. c. 119.

claration that there is no impediment of kindred or alliance, or other lawful hindrance to the marriage; and when either party—not being a widower or widow—is a minor, that the proper consent has been given, or that there is no person whose consent is required. The notice is entered by the registrar, in a book called “The Marriage Notice Book,” and which is open to public inspection at all reasonable times.⁸

A copy of the notice must be “suspended in some conspicuous place” in the superintendent registrar’s office during twenty-one days next after the day it was entered in the notice book, and at the expiration of that time the certificate will be issued, upon the request of the person who delivered the notice.⁹

Regis-
trar’s
Licence.

When the marriage is intended to take place upon the licence of the superintendent registrar, if both parties do not dwell in the same district, notice need not be given to the registrar of each district, but only to the registrar of the district in which one of the parties resides; and the declaration must show a residence in the district for at least fifteen days next before the notice, and a licence authorizing an immediate marriage may issue on the second day after the entry in the notice book.¹

The certificate or licence always specifies the place where the marriage is to be solemnized; which may either be the office of the superintendent

⁸ 6 & 7 Wm. IV. c. 85, ss. 4, 5; 19 & 20 Vict. c. 119, ss. 2, 3, and Sch. A.

⁹ 19 & 20 Vict. c. 119, s. 4. ¹ 19 & 20 Vict. c. 119, ss. 2, 6, 9.

registrar himself, or a registered building: that is, any building certified according to law as a place of religious worship, and registered as a place for the solemnization of marriage.²

When the marriage takes place in the registrar's office, it must be solemnized in the presence of the superintendent registrar: when in a registered building, in the presence of one of the registrars under his superintendence. Both in the registrar's office, and in registered buildings, the marriage must be solemnized in the presence of two witnesses, and between the hours of 8 and 12 in the forenoon; and the parties must declare that they take each other as husband and wife, knowing of no lawful impediment. The addition of any kind of religious ceremony is permitted in a registered

² Such building must, as a general rule, be within the district, or one of the districts in which the notice was given; but the certificate or licence may authorize the solemnization of the marriage in the usual place of worship of the parties, or in a registered building within the nearest district in which the ceremonies which they wish to adopt are used upon special cause being shown by certain forms of declaration prescribed by 3 & 4 Vict. c. 72.

No marriage can be solemnized, under the registrar's certificate, in any church or registered place of worship without the consent of the minister of such church or place of worship. 19 & 20 Vict. c. 119, s. 11. A marriage cannot take place in a church or chapel of the Church of England upon the registrar's "licence," 6 & 7 Wm. IV. c. 85, s. 11, it being the intention of the Legislature not to interfere with the exclusive privilege in that respect vested in the Archbishop and other authorities.

building, but prohibited in the superintendent registrar's office.³

Marriages
of minors.

With respect to the marriages of minors, the consent of parents and guardians—subject to an appeal to the Court of Chancery in cases of unreasonable refusal—is so far required by law that the parent or guardian by publicly forbidding the banns or the solemnization, or by caveat, or by entry in the registrar's marriage notice book, may prevent the banns from proceeding, or the licence or certificate from issuing; or the marriage from taking place; but no proof of consent is required beyond the declarations of the parties; and the marriage of a minor, if actually solemnized without the requisite consent, is valid in law.⁴

³ 6 & 7 Wm. IV. c. 85, ss. 20, 21. 19 & 20 Vict. c. 119, s. 12. It is by this last section however enacted, that if the parties to a marriage at the registry office, desire to add the service ordained or used for marriage by the church or persuasion of which they are members; they may present themselves for that purpose to the minister, who, on production of the certificate, and payment of the customary fees, if any, may if he shall see fit, read or celebrate such service accordingly. But he may not do so in any church or chapel of the Church of England unless he is in Holy Orders; nor shall any such reading or celebration supersede or invalidate the marriage previously contracted, or be entered as a marriage in the parish register.

⁴ 4 Geo. IV. c. 76, ss. 8, 11, 23; 6 & 7 Wm. IV. c. 85, ss. 9, 10, 25; 19 & 20 Vict. c. 119, s. 17. A caveat, or entry of prohibition in the Registry of the Ordinary, or in a Registrar's Office, alleging any legal impediment to a marriage, stops the issue of the surrogate's licence or of the registrar's certificate or licence until the objection is disposed of in due course of law. In the former case, a caveat entered

No publication of banns, common or special licence, or superintendent registrar's certificate or licence is available as legal authority for the solemnization of any marriage at any time more remote than three months from the date of the last publication of banns or of the issue of the certificate or licence.⁵

All marriages, whether solemnized under 4 Geo. IV. c. 76, or under the more recent acts, are required by law to be registered; and marriage register books in a prescribed form, and forms for certified copies, are furnished by the Registrar-General to the clergy of the Established Church authorized to solemnize marriages, to the superintendent and subordinate registrars, and to the registering officers of the Quakers, and certified secretaries of Jewish synagogues. Every officiating minister of the Established Church, registering officer of Quakers, secretary of the husband's synagogue in the case of Jews, or civil registrar present at a marriage, is required by law to enter in these books, immediately after their celebration, all marriages solemnized by him or in his presence, and to send duplicates or copies every three months to the superintendent registra-
Registra-
tion.

in the Registry of the Ordinary may be brought for adjudication before the Judge for whom the surrogate is deputy, and in the latter, the superintendent registrar may inquire into and decide upon the validity of such an objection, subject to an appeal to the Registrar General. 4 Geo. IV. c. 76, s. 11; 6 & 7 Wm. IV. c. 85, s. 13.

⁵ 4 Geo. IV. c. 76, ss. 9, 19; 19 & 20 Vict. c. 119, ss. 4, 9, and Sch. C.

trars—or, in case of the clergy of the Established Church, to some registrar of the district, by whom such duplicates or copies are to be transmitted to the superintendent registrar—and each superintendent registrar, four times in every year, is required to transmit the duplicates or copies so sent, to the Registrar General.⁶

Proof of
marriage.

Both the ecclesiastical and civil registers are received in the Court as evidence of marriage, and are by themselves sufficient for the *prima facie* legal proof of its due celebration. The petitioner, being now a competent witness in all matrimonial suits, is usually called to give evidence, amongst other things, of the fact of marriage; and at the same time a certified extract from the Registrar General's Office is produced as formal proof. Where, however, the petitioner is not called as a witness, the fact of marriage is established by producing the register or the certified extract, and the identity of the petitioner by a witness present at the marriage, or who knew the parties when living together as husband and wife.⁷

When
celebrated
out of
England.

Where the marriage has taken place abroad, whether between British subjects or between

⁶ See 6 & 7 Wm. IV. c. 86, ss. 30, 31, 33, 34.

⁷ The 46th section of the Divorce Act provides that parties shall be at liberty to verify their respective cases in whole or in part by affidavit. In a suit for dissolution of a marriage which had been celebrated in Scotland where the witnesses who could prove it resided, the Court made an order—there being no opposition—that the petitioner should be allowed to prove it at the hearing by affidavits. *M'Kechnie v. M'Kechnie*, 1 S & T. 550.

The application for such an order must be made on motion.

foreigners, in any of her Majesty's possessions or in a foreign country, it must be proved to have been celebrated according to the forms required by the then existing law of the country in which it took place; for, as a rule, every marriage is to be deemed good or bad according to its celebration in compliance with, or contrary to the law of the place in which it was had.⁸

In *Herbert v. Herbert*,⁹ a clandestine marriage In Sicily. between an Englishman and a Sicilian woman celebrated at Palermo in Sicily, in 1814, and valid by the laws of that kingdom, was held valid here.

In *Abbott v. Abbott* and *Godoy*,¹ a marriage in In Chili. Chili was proved by the production of a certified extract of the entry of the marriage in the marriage register proved to be kept in Chili in compliance with the requirements of the law of Chili, and to be admissible in evidence there, upon the Court being satisfied of the identity of the parties named in the certificate, and of the curate rector who gave the certificate.

In *Rooker v. Rooker* and *Newton*,² the marriage In Vir-
ginia.

⁸ *Scrimshire v. Scrimshire*; *Middleton v. Janverin*; 2 Consist. pp. 395, 437.

⁹ 2 Consist. 263, and on appeal, 3 Phill. 58. Evidence was given by professors of the law of Sicily, that by the decree of the Council of Trent, A.D. 1563, received and obeyed as law throughout Sicily, clandestine marriages, though irregular, were valid; and that the mutual and free consent of the parties contracting marriage expressed in the presence of the priest of the parish in which one of them resided and in the presence of two witnesses was sufficient to constitute matrimony.

¹ 4 S & T. 254.

² 3 S & T. 526.

was proved by evidence that the parties had lived together as man and wife, and that in the State of Virginia, where the marriage was contracted, "the mere cohabitation of a man and woman who proclaimed themselves and were received in society as man and wife constituted in the eye of the law a valid marriage."

At Gretna
Green.

In *Patrickson v. Patrickson*;³ in proof of a marriage at Gretna Green,⁴ a book was produced kept by the person who professed to celebrate or to be a witness to such marriages, containing an entry stating that the parties had been married on a certain day, which was signed by the petitioner; it was also proved that the petitioner and respondent had gone from their homes at S. together, stating that they intended to get married at G.; that they had returned to S. and stated that they had been married at G.; and that they afterwards cohabited for many years at S. as husband and wife. No other evidence being procurable, the marriage was held to be sufficiently proved.⁵

³ L. R. 1 P. & D. 86.

⁴ The practice of contracting clandestine marriages at Gretna Green and other places in Scotland immediately after crossing the border has been effectually suppressed by Lord Brougham's Act, 19 & 20 Vict. c. 96, under which it is necessary for the validity of any marriage contracted in Scotland that one of the parties should either have his or her usual place of residence in Scotland at the date of the marriage, or have lived in Scotland for 21 days next preceding such marriage.

For the law of marriage in Scotland, see *Yelverton v. Yelverton*, 4 Macqueen's H. of L. Cas. 745. Report on Marriage Laws, 1868, p. xvi.

⁵ Semper presumitur pro matrimonio; and therefore coha-

The common law of England, as it stood previously to Lord Hardwicke's Act, was carried to the British colonies, where it was not altered by that Act, and therefore still prevails unless modified by Imperial statute or by the local legislatures with the sanction of the Crown.⁶

Marriages
in the
British
Colonies.

In *Coode v. Coode*,⁷ a marriage at Barbadoes in 1823 was proved by the testimony of the captain of the vessel to which the husband belonged, that he was aware of the intention of the parties to marry; that he wrote to the Governor to obtain a special licence for their marriage, and that after the marriage was supposed to have taken place, they returned to the ship as man and wife, and were so treated. A collated copy of an entry in the marriage register, kept in pursuance of a law of the island, was also produced, and received as evidence.

The presumption of the law is always in favour of the validity, and against the nullity of marriage; and therefore no words in a marriage Act will be held to import a nullity, unless they expressly create a nullity. In *Catterall v. Catterall*,⁸ a marriage had in New South Wales, in 1834, before

bitation as man and wife creates a strong impression in favour of marriage where the woman's character is unblemished, because the law does not suppose that a woman whose character in general is virtuous would live with a man as her husband who is not so. See *Conran v. Lowe*, 1 Lee's Eccl. Cas. p. 638.

⁶ *Countess of Limerick v. Earl of Limerick*, 4 S. & T. 252, where a marriage in Norfolk Island in the year 1842 was held to be sufficiently proved by evidence of its having been solemnized in a room by a clergyman of the Church of England according to the rites and ceremonies of that Church.

⁷ 1 Curt. 755.

⁸ 1 Roberts. 304, 580.

a Presbyterian minister, where there was a fact of consent between the parties to become husband and wife, was held to be a valid marriage, although certain provisions in a local marriage Act had not been complied with, there being no words in that act constituting a nullity.

So in *Ward and Codd v. Dey*,⁹ a marriage between British Protestant subjects domiciled at Demerara, solemnized at the Island of St. Lucia according to the rites and ceremonies of the Church of England, by a priest in Holy Orders of that Church, in the parish church of which he was the minister, without the formalities required by the general law of the Island, under a licence from the Governor, was held, upon the evidence of persons skilled in the law of the Island, to be in conformity with the *lex loci*, and therefore valid.¹

Marriages
in India.

Marriages between British subjects in India

⁹ 1 Roberts. 759; 7 N. of C. 96.

¹ Various acts having been passed by the legislatures of divers of her Majesty's possessions abroad for the purpose of establishing the validity of certain marriages previously contracted therein; it was enacted by 28 & 29 Vict. c. 64, that every law made or to be made by the legislature of any of her Majesty's possessions abroad for the purpose of establishing the validity of any marriage previously contracted in such possession shall have and be deemed to have had from the date of the making of such law, the same force and effect within all parts of her Majesty's dominions, as such law may have had or may hereafter have within the possession for which the same was made: provided that no marriage shall be thereby made valid, unless, at the time of such marriage, the parties thereto were competent to contract the same, *according to the law of England*.

were formerly governed by the English law as it existed previously to Lord Hardwicke's Act; and notwithstanding the decision in *The Queen v. Millis* in 1844,² the Supreme Court of Bombay in 1849 held that a marriage celebrated between British born subjects, members of the Church of England, at Surat by an Independent Missionary not in Holy Orders was a valid marriage.³ But now, marriages in India of persons professing the Christian religion are regulated by 14 & 15 Vict. c. 40, and by the Indian Acts passed for giving effect to its provisions.

All marriages of British subjects in foreign countries are recognized as valid, except in cases where the parties would not be competent by the law of England to contract a valid marriage. Where, however, it was not possible for a British subject in a foreign country professing a religion essentially different to avail himself of the forms of the *lex loci contractus*, the marriage of a British subject within the limits of a trading company or the hotel of an ambassador solemnized according to the law of England as it existed before Lord Hardwicke's Act has always been upheld as valid by the English Courts.

Marriages
of British
subjects in
foreign
countries.

And upon the same principle, the marriage of a British subject solemnized in like manner within the lines of a British army serving abroad, was held to be valid. But this latter class of marriages

² Ante, p. 32.

³ *Maclean v. Cristall*, 7 N. of C. Suppt. xvii.

was not judicially recognized until Lord Stowell's decision in *Ruding v. Smith*,⁴ in favour of a marriage solemnized by the chaplain of the English forces in occupation of the Cape of Good Hope, between two British subjects in a private house; and in order to remove all doubts respecting the three classes of marriages above mentioned, it was enacted by 4 Geo. IV. c. 91, that all marriages solemnized by a minister of the Church of England, in the chapel or house of any British ambassador or minister residing within the country to the Court of which he is accredited, or in the chapel of a British factory abroad, or in the house of any British subject residing in such factory, and all marriages solemnized within the British lines by any chaplain or officer or other person officiating under the orders of the commanding officer of a British army serving abroad,⁵ shall be deemed as valid in law as if they had been solemnized within the British dominions in due form of law.⁶

Consular Marriage Act, 1849. In order to afford greater facilities for the marriages of British subjects in foreign countries, it is

⁴ 2 Consist. 371. The marriage in question was in 1796; the Cape having surrendered to the British forces about a year before. Lord Stowell's decision was in 1821.

⁵ Though there may be no actual hostility at the time. See *The Waldegrave Peerage Case*, 4 Cl. & Finn. 649.

⁶ Although nothing is expressed in this statute with respect to marriages where one of the parties only is British, there are no words of exclusion. In *Lloyd v. Petitjean*, 2 Curt. 251, a marriage between an Englishman of full age and a Frenchwoman at the hotel of the British Ambassador at Paris, was held valid under this Act.

provided by 12 & 13 Vict. c. 68, that—both or one of the parties to the marriage being subjects or a subject of this realm—any British Consul-General, Consul, Vice-Consul, or Consular Agent, specially authorized in writing under the hand of one of Her Majesty's principal Secretaries of State, may, on receiving due notice, grant a licence for the marriage, and at the expiration of seven days, if the marriage is by licence, or twenty-one days if without licence, after the notice has been given, may allow its solemnization in his presence according to the rites of the Church of England, or according to such other form and ceremony as the parties may choose to adopt; or, if so desired, may personally solemnize the marriage: provided always that such marriages shall be solemnized at the British Consulate, with open doors, between the hours of 8 and 12 in the forenoon, in the presence of two or more witnesses, and that where such marriage is not solemnized according to the rites of the Church of England, in some part of the ceremony, and in the presence of the Consul and the witnesses, each of the parties shall solemnly declare that they know not of any lawful impediment to their marriage, and shall call the parties present to witness that they take each other respectively to be lawful husband and wife.⁷

⁷ The 20th section confirms certain past marriages, as to the validity of which doubts might be entertained as not being within the scope of 4 Geo. IV. c. 91. And see also the following Acts: 4 Geo. IV. c. 67, to render valid marriages had at *St. Petersburg* in the chapel of the Russia Company and in

Consular
Marriage
Act, 1868.

And the amending Act, 31 & 32 Vict. c. 61, confirms certain marriages—both or one of the parties being subjects or a subject of this realm—solemnized by any person acting in the place of the British Consul at certain places in China and elsewhere, and provides for the legality of such marriages in future.

CONFLICT OF MARRIAGE LAWS.

*Lex loci
contractûs.*

Although the general rule is that a marriage valid according to the law of the country where it is celebrated, whatever that law may be, is good everywhere, its validity must in some cases depend upon the law of the domicil of the parties contracting. With respect therefore to the marriages of British subjects in foreign countries : while the forms of entering into the contract of marriage are to be regulated according to the *lex loci contractûs*, the law of the country in which the marriage is

private houses whether both or one of the parties be British subjects ; 3 & 4 Wm. IV. c. 45, to declare valid marriages solemnized at *Hamburg* since the abolition of the British factory there ; 5 Geo. IV. c. 68, with respect to the celebration of marriages in *Newfoundland* ; 17 & 18 Vict. c. 88, to render valid certain marriages of British subjects in *Mexico* ; 21 and 22 Vict. c. 46, confirming marriages solemnized in the chapel of the Russia Company at *Moscow* ; and certain marriages solemnized at *Ningpo* and *Tahiti* ; 22 & 23 Vict. c. 64, confirming marriages in the British chapel at *Lisbon* ; 30 & 31 Vict. c. 93, confirming marriages solemnized by the chaplain of the Saint John Del Rey Mining Company at *Morro Velho* in *Brazil* ; 30 and 31 Vict. c. 2, declaring valid certain marriages solemnized at *Odessa*.

celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Lex domicilii.

The forms of celebrating the foreign marriage may be different from those required by the law of the country of the domicile, yet the marriage may be good everywhere; but, in the case of domiciled British subjects, if the foreign marriage be essentially contrary to, and is declared void by the law of England, it will be regarded as invalid here though not contrary to the law of the country where celebrated.⁸

Persons cannot evade the law of their domicile by fraudulently going into another country to do that which by the law of their own country is forbidden.⁹ A marriage therefore contracted by domiciled British subjects in another country is not to be held valid if by contracting it, the laws of their own country are violated. In *Brook v. Brook*,¹ the question was whether a marriage contracted between Wm. Leigh Brook, a widower, and the sister of his deceased wife, in Denmark, such

⁸ *Harford v. Morris*, 2 Consist. 423.

⁹ Huberus puts this case: "Brabantus uxore ducta dispensatione Pontificis in gradu prohibito, si huc migret, tolerabitur; at tamen si Frisius cum fratris filia se conferat in Brabantiam ibique nuptias celebret, huc reversus non videtur tolerandus; quia sic jus nostrum pessimis exemplis eluderetur." *Praelectiones Juris Civilis*, lib. I. tit. III.: de confl. legum, 8.

¹ 9 H. of L. 193.

marriages being there lawful, was valid in England, both parties to it being at the time it was contracted native born English subjects domiciled in England, and only on a temporary sojourn in Denmark. It was held that the 5 & 6 Wm. IV. c. 54,² affects all domiciled English subjects wherever they may be transiently resident, and that the marriage was therefore void.

The provisions of this Act and the principles above laid down have been held to apply equally to a naturalized English subject.

In *Mette v. Mette*,³ a native of Marburg, in the electorate of Hesse Cassel, came to England at the age of 13, and though he paid occasional visits to Germany, remained domiciled, and carried on his business in England, and was ultimately naturalized by Act of Parliament. His wife having died, he went to Frankfort, and there was married to a sister by the half-blood to his former wife, such marriage being valid by the law of Frankfort, and soon after returned to England, where he remained until his death. It was held that his second marriage was void, and that it had not the effect of revoking his will formerly made.

The law of foreign marriages as above laid down applies only to domiciled British subjects having a temporary residence in, or resorting to a foreign

² Which enacted, s. 2, that "all marriages which should thereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be absolutely null and void to all intents and purposes whatsoever."

³ 1 S. & T. 416.

country to evade the laws of their own. A marriage valid by the law of the country where celebrated between foreigners or between British subjects *bonâ fide* domiciled in such foreign country, might, upon their afterwards acquiring an equally *bonâ fide* domicile in England, properly become the subject of a matrimonial suit in the English Matrimonial Court.

Marriage, however, as conferring the status of Polygamy. husband and wife recognized throughout Christendom, is the voluntary union for life of one man and one woman to the exclusion of all others. A marriage contracted in a country where polygamy is lawful between a man and woman who profess a faith which allows polygamy is not a marriage as understood in Christendom; and though it may be a valid marriage according to the *lex loci*, and at the time when it was contracted, both the man and woman were competent to contract marriage, the English Matrimonial Court will not recognize it as a valid marriage in a suit instituted by one of the parties against the other for the purpose of enforcing matrimonial duties, or obtaining relief for a breach of matrimonial obligations.⁴

⁴ In *Hyde v. Hyde & Woodmansee*, L. R. 1 P. & D. 130, the marriage was contracted in the territory of Utah according to the ceremonies of the Mormons, both parties being single at that time. The petitioner, who was an Englishman by birth, having renounced the Mormon faith, returned to England. The woman refused to follow him, and subsequently contracted a second marriage. His petition for dissolution of marriage was dismissed.

And see Lord Brougham's judgment in *Warrender v. Warrender*, 2 Cl. & Finn. pp. 531, 532.

Marrriages
of
foreigners
in
England.

The same rule of law, that the validity or invalidity of a marriage must be decided by the law of the country where it is solemnized, applies to marriages contracted by foreigners in England; and though they may not have complied with the forms imposed upon them by the law of the country of their domicil; if the marriage is good according to the law of England, it will be upheld by the English Courts.

In *Simonin v. Mallac*,⁵ the parties being natives of, and domiciled in France, came to London, and were married by licence at the parish Church of St. Martin's-in-the-Fields, but without the observance of certain formalities and consents required by the law of France in respect of the marriage of its own subjects in foreign countries. The marriage was not consummated, and they returned to France the next day. The man refused to celebrate the marriage according to the French law, and the woman instituted a suit for nullity in the French Courts, which the man did not defend, and a decree of nullity was pronounced. The woman afterwards came to reside in England, and petitioned for a decree of nullity in this Court: the man was served with a citation in Naples, but did not appear. It was held that the contract having

⁵ 2 S. & T. 67. And see *Compton v. Bearcroft*, 2 Consist. 443, 444, *in notis*, where the parties having gone to Scotland to evade the operation of the English Marriage Act, and having been there married in a way not good in England but good in Scotland, were considered to have contracted a valid marriage.

been entered into in this country, the personal status resulting from such contract was to be ascertained by the law of this country, and not any special law of the country of the domicile of the parties to the contract; and the petition was dismissed.

This decision, it is clear, in no way conflicts with *Brook v. Brook*, for in that case, the essentials, in this, the forms only of the marriage law, were violated.

A very important conflict of law arises when doubts are raised respecting the validity of a second marriage contracted by persons whose first marriage has been dissolved by a foreign or colonial Court. The recognition by the English Courts of a foreign divorce of an English marriage may be considered to depend; first, upon the domicile of the parties at the time of such divorce; secondly, upon the sentence having been pronounced upon a ground of divorce recognized by the English Law.

Foreign
divorces of
English
marriages.

In *Lolley's* case,⁶ a domiciled Englishman having been married in England, and while still domiciled in England, having been divorced by decree of the Court of Session in Scotland, and having afterwards married a second wife in England, his first wife being still alive, was convicted of bigamy in England, and held by all the judges to have been

⁶ 2 Cl. & Finn. 567; Russ. & Ry. C. C. 237. See this case very fully commented upon in *Shaw v. Gould*, L. R. 3 H. of L. at pp. 71, 75, 85, 93.

rightly convicted because the sentence of the Scotch Court dissolving his first marriage was a nullity.⁷

The question has since been the subject of very elaborate discussion in a series of cases⁸ in which

⁷ So in *Conway v. Beazley*, 3 Hagg. 639. B. in 1810 married Miss R. in London. In 1823, they were divorced by the Commissary Court at Edinburgh, and in 1824, B. contracted a second marriage at Edinburgh with Miss C. The first wife died in 1830, and in 1831, the second wife petitioned for a decree of nullity on the ground of bigamy. The Court pronounced the second marriage null and void on the ground that neither of the parties to the first marriage were at any time *bonâ fide* domiciled in Scotland.

⁸ *Warrender v. Warrender*, 2 Cl. & Finn. 488. Sir George Warrender, born and domiciled in Scotland, married an Englishwoman in England, but instead of changing his domicile, he meant that his matrimonial residence should be in Scotland, where he had large landed estates, on which the wife's jointure was charged. Having lived a short time in Scotland, they separated. Sir George, continuing domiciled in Scotland, commenced a suit in the Court of Session against his wife on the ground of her adultery committed on the continent of Europe. It was objected that the Scotch Court had no jurisdiction to dissolve the marriage, and *Lolley's* case was relied upon. But it was held that as Sir G. Warrender was at the time of his marriage a domiciled Scotchman, and Scotland was to be the conjugal residence of the married couple, and that as no other domicile could be legally ascribed to the wife, both parties were domiciled in Scotland, and that the Scotch Court had therefore jurisdiction to entertain the suit.

The distinction between *Lolley's* case and *Warrender v. Warrender* being clearly that in the former, the man's domicile was English and English only, whereas Sir G. Warrender never for a moment abandoned his Scotch domicile.

In *Dolphin v. Robins*, 7 H. of L. 390, a domiciled Englishman married an Englishwoman in England. Having separated by consent, the husband went to Scotland, but without any

nice distinctions have been drawn; but the result of the decisions may be thus summed up: that in accordance with *Lolley's* case, which has never been overruled, the Scotch Courts have no power to dissolve an English marriage, when the parties

Result of
the deci-
sions.

apparent intention of permanent residence, and there committed adultery. When he had been there about six months, the Court of Session, at the suit of his wife, made a decree dissolving their marriage. It was held that the husband by his residence in Scotland did not acquire a Scotch domicile, and that his marriage was not dissolved by the Scotch decree of divorce.

In *Pitt v. Pitt*, 4 Macqueen's H. of L. cas. 627, the husband having, in 1854, gone to Scotland to evade his creditors, ultimately took a shooting lodge there for six years; but in his correspondence always expressed an anxious desire to return to England. In 1860 he instituted a suit for dissolution of marriage in Scotland on the ground of his wife's adultery in England, she never having joined him in Scotland. On appeal from the Scotch Court on the question of its jurisdiction to entertain the suit, it was held that the husband had never abandoned his English domicile, or acquired such a domicile in Scotland as to give the Scotch Court jurisdiction.

So in *Shaw v. Gould*, L. R. 3 H. of L. 55, where the husband, being a domiciled Englishman, having no connexion with Scotland, went there for the purpose of giving the Scotch Court jurisdiction in a suit for divorce at the instance of his wife; the same doctrine was held, and the previous cases were very fully commented upon and explained.

Again, in *Shaw v. The Attorney General*, L. R. 2 P. & D. 156, the Court refused to recognize a divorce obtained by an Englishwoman in America, her husband having throughout remained domiciled in England.

On the other hand, in *Argent v. Argent*, 4 S. & T. 52; 34 L. J. 133, where a marriage, divorce, and second marriage took place between parties domiciled during the whole time at the Cape of Good Hope, the second marriage was held valid.

are not really domiciled in Scotland, but have only gone thither for such a time as according to the Scotch Courts gives them jurisdiction in the matter; and applying the principle of that decision more broadly, that an English marriage between English subjects cannot be invalidated by a foreign divorce when the parties are not domiciled in the country by whose tribunals the divorce is granted. Whether if so domiciled, the English Courts would recognize and act upon such divorce is not yet free from doubt, but the better opinion appears to be that they would do so if the divorce were founded upon a ground of divorce recognized as such in this country, and it certainly seems only just that persons who have permanently taken up their abode in a foreign country should be allowed to resort to the tribunals of the country they have adopted instead of being forced back upon the law of their original distant domicil.

ENGLISH DOMICIL, THE FOUNDATION OF THE RIGHT TO SUE.

Domicil in
England.

Although the jurisdiction of the Court is not, by the Divorce Act, confined to England, the power of the Court to entertain a matrimonial suit may be called in question, either when the parties are not English subjects, or are not *bonâ fide* domiciled—that is, permanently resident—in England at the time of instituting the suit.⁹ “The Court is a

⁹ The law of domicil, as here stated, must be understood as restricted to its bearing on matrimonial suits.

Court for England, not for the United Kingdom, and for the purposes of this question of jurisdiction, Ireland and Scotland are to be deemed foreign countries equally with France or Spain."¹

The Court is not itself disposed to limit or define its jurisdiction, and will not allow a respondent who appears absolutely or submits without protest in the first instance to the jurisdiction of the Court, to amend that appearance, and enter an appearance under protest. A respondent, therefore, who has entered an appearance cannot file an answer pleading to the jurisdiction only, but must answer to the merits, and may then at the same time allege facts raising the question of the jurisdiction;² and the domicile which no doubt ought to be English in

¹ *Yelverton v. Yelverton*, 1 S. & T. 586.

² *Zycklinski v. Zycklinski*, 2 S. & T. 420, where the respondent pleaded to the jurisdiction after appearing absolutely, and it was held that he was no longer in a position to avail himself of such a plea, but must answer to the merits. So in *Forster v. Forster & Berridge*, 3 S. & T. 144, it was held that the respondent who had appeared absolutely by attorney and not in person or under protest, must file an answer. So also in *Garstin v. Garstin*, 4 S. & T. 73; 34 L. J. 45.

By Rule 22, If a party cited wishes to raise any question as to the jurisdiction of the Court, he or she must enter an appearance under protest, and within eight days file in the Registry his or her act on petition* in extension of such protest, and on the same day deliver a copy thereof to the Petitioner. After the entry of an absolute appearance to the citation a party cited cannot raise any objection as to jurisdiction.

See *Wilson v. Wilson & Howell*, 40 L. J. 77, and on appeal, 41 L. J. 1.

* As to proceedings by act on petition, see Rules 56 to 61, and Form No. 9 in Appendix.

order to found the suit, is then to be determined as a question of fact.

But though a respondent may appear without protest, and answer on the merits, and upon the facts disclosed at the hearing it turns out that the Court has no jurisdiction, it by no means follows that It will therefore go on and make a decree.³ Assuming however, that the parties are English subjects or are domiciled in England, it matters little where the offence which forms the subject of the suit was committed, or where the parties resided at the time of such offence.⁴ *Primâ facie*, at least, the husband's actual and the wife's legal domicile are presumed to be one wheresoever the wife may be personally resident;⁵ and therefore, even if he has been guilty of such misconduct as would furnish her with a defence to a suit by him

³ *Deck v. Deck*; *Bond v. Bond*; *Brodie v. Brodie*; 2 S. & T. 90, 93, 259; *Wilson v. Wilson & Howell*, 40 L. J. 77. In this case the respondent filed an answer merely denying the jurisdiction of the Court, and the answer was ordered to be struck out unless the respondent amended it within a certain time by answering to the merits. She then entered an appeal, notwithstanding which, the Court directed the mode of hearing of the petition. L. R. 2 P. & D. 292.

⁴ *Ratcliffe v. Ratcliffe & Anderson*, 1 S. & T. 467, where the marriage and adultery took place in India, and the petitioner and co-respondent were English officers quartered in India.

⁵ *Chichester v. Donegal*, 1 Add. 19; *Whitcomb v. Whitcomb*, 2 Curt. 351. But the presumption fails when the wife has obtained a judicial separation. *Williams v. Dormer*, 2 Roberts. 505, where a divorce *a mensâ et toro* having been pronounced at the suit of the wife, the husband subsequently petitioned for nullity of marriage, but the case went no further.

for restitution of conjugal rights, she cannot, on that ground, acquire a separate domicile for herself.

In *Yelverton v. Yelverton*,⁶ a suit by the wife, at that time resident in England, for restitution of conjugal rights—the husband was born in Ireland of Irish parents, and when a minor received a military education in England, obtained a commission in the Royal Artillery, and was afterwards stationed at or near Edinburgh. When there, he married the petitioner in Scotland, cohabited with her there and in France, where he quitted her, returned to Edinburgh, and refused again to live with her. It was held that as there was no proof of his having acquired an English domicile, and the petitioner's domicile was that of her husband, the Court had no jurisdiction to entertain the suit.⁷

On the other hand, a natural born English subject, whose domicile of origin is English, cannot by a change of domicile shake off his allegiance to the Crown, and liability to be affected by the laws of England. In *Deck v. Deck*,⁸ the petitioner, an Englishwoman, was married to the respondent, a natural born English subject, in England. He afterwards left her, acquired a domicile in America, and there committed bigamy and adultery. The Court dissolved the marriage.

Again in *Bond v. Bond*,⁹ the petitioner, an

⁶ 1 S. & T. 574.

⁷ The alleged legal fiction that he was supposed to be present at the head-quarters of the regiment of artillery in which he had a company as founding his English domicile, was rejected.

⁸ 2 S. & T. 90.

⁹ 2 S. & T. 93.

Englishwoman, was married to the respondent in England: they lived first at Clifton, then at the house of the respondent's father in Ireland, then in London. They afterwards went again to Ireland, but returned to England, bringing with them a woman servant, who shortly afterwards returned to Ireland, and the respondent went there also. In the same year, the petitioner went to Ireland to her husband, who was then living at a place called Grange Hall. She found that he was living in open adultery with the woman servant: he treated his wife with great cruelty, and she returned to England. On her petitioning on the grounds of adultery and cruelty, the Court held that there was no evidence of so conclusive a nature as to compel It to deal with the respondent as an Irishman, and dissolved the marriage.

Foreigner
resident in
England.

The *bonâ fide* settled residence of the husband, though a foreigner in England, is sufficient to found the jurisdiction of the Court against the wife who has committed adultery abroad. In *Brodie v. Brodie*,¹ the petitioner, a Scotchman by birth, went to Australia, and there married and settled. A separation by mutual consent took place in consequence of a quarrel, and a deed was entered into under which the petitioner made his wife an allowance. He then returned to England with his children, and after residing in various places, ultimately bought the lease of a house in London. Evidence was given that after he became resident in Eng-

¹ 2 S. & T. 259.

land, his wife had been carrying on an adulterous intercourse in Australia. The Court held that he was entitled to a dissolution of his marriage.

But on the other hand, mere residence is not sufficient ; it must be *bonâ fide*, not casual or as a traveller. In *Manning v. Manning*,² a suit by the husband, whose domicil was Irish, for judicial separation on the ground of the wife's desertion, the wife appeared under protest, and pleaded to the jurisdiction : the husband made an affidavit stating that he was permanently settled in England, and had taken a place of business in London, and had no intention of returning to reside in Ireland. It appeared, however, that in this place of business there was no apartment for residence, and that he could put an end to the lease at any time upon either a six or twelve months' notice. The Court held that he was not *bonâ fide* resident in England in the sense of the decision in *Brodie v. Brodie*, and dismissed his petition.

² L. R. 2 P. & D. 223.

CHAPTER II.

Of Suits for Dissolution of Marriage, and for Judicial Separation—Suit by the Husband—Co-respondent—Alleging Adultery—Evidence of Adultery—Identity of the Parties—Costs against Co-respondent; against Respondent—Damages—Wife's Suit—Incestuous Adultery—Bigamy with Adultery—Rape—Cruelty—Desertion.

Grounds
of suit for
dissolution
of mar-
riage.

THE grounds on which persons are entitled to petition for dissolution of marriage are—in the case of the husband; that his wife has, since her marriage with him, been guilty of adultery¹—in the case of the wife; that her husband has, since his marriage with her, been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensâ et toro*, or of adultery coupled with desertion without reasonable excuse for two years or upwards.²

For judi-
cial sepa-
ration.

A sentence of judicial separation may be obtained either by the husband or the wife on the ground of adultery, or cruelty, or desertion without cause for two years and upwards.³

¹ Antenuptial incontinence cannot be alleged, for it has been purged *quoad* the husband by his consenting to take her for his wife. *Perrin v. Perrin*, 1 Add. 4. ² Divorce Act, s. 27.

³ Divorce Act, s. 16. It will be observed that the terms qualifying "desertion" are slightly varied in the two sections

There is this difference between suits by the husband and the wife: the husband, by establishing his wife's adultery, may, at his option, obtain a complete dissolution of his marriage, or merely a separation from bed and board; but the wife, on the other hand, if she can prove no more than her husband's infidelity, is entitled only to a judicial separation: to entitle her to a dissolution of her marriage, she must establish either one of the criminal offences; or, in addition to his adultery, one of the other offences above enumerated.

Difference
between
suits by
husband
and by
wife.

First; of the husband's suit for dissolution of marriage: he must, unless on special grounds to be allowed by the Court, make the alleged adulterer a co-respondent⁴—that is, he must name the man with whom his wife has been guilty of adultery so as to make him a party to the suit—one object of this provision being that he may have an opportu-

Husband's
suit.

Co-respondent.

above set out; but practically, they must be read together; "desertion without cause" is equivalent to "desertion without reasonable excuse." The right to relief on this ground accrues where the desertion has been for two years: there is no legal distinction between the words "or upwards" and "and upwards." Suits on the ground of desertion are almost invariably by the wife. A deserted husband, by obtaining a sentence of judicial separation, procures only immunity from his wife's debts and liabilities; besides, a woman who deserts her husband, generally gives him ground for obtaining complete relief if he chooses to seek it.

⁴ Divorce Act, s. 28, which also enacts that "on every petition presented by a wife for dissolution of marriage, the Court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent." I am not aware that this has ever been done.

nity of appearing and vindicating himself. Moreover, if the petitioner were allowed to proceed without alleging an adulterer, he would get rid of one person interested in defending the suit by bringing forward all the facts of the case. In most cases, however, there is no difficulty in making a co-respondent—as, where the wife has either committed adultery in her home, or has eloped with the adulterer, who is perhaps well known to, or is even an intimate friend of the husband. If the wife has abandoned herself to several men, every man with whom she is alleged in the petition to have committed adultery, must be made a co-respondent;⁵ in other words, a husband cannot in his petition charge his wife with adultery with a particular man whom he makes a co-respondent, and then go on to allege adultery with other men without also making them co-respondents.

When dispensed with.

An allegation of adultery implies an adulterer within the meaning of the 28th section of the Divorce Act, and therefore if the petition charges adultery with a person unknown, and names no adulterer, the leave of the Court must be obtained to proceed without making a co-respondent.⁶ The circumstances under which the husband may be excused from making the persons with whom the

⁵ *Carryer v. Carryer & Watson*, 4 S. & T. 94. And see Rule 4 in Appendix.

⁶ *Pitt v. Pitt*, L. R. 1 P. & D. 464. And see Rules 5 and 6 in Appendix.

As a general rule, the Court will not dispense with a co-respondent on the affidavit of the petitioner alone.

adultery is alleged parties to the suit are, generally, where the wife has been frequenting, or living in a brothel, or leading the life of a prostitute—whenever, in short, she can be proved to have committed adultery with some man or men against whom there is not sufficient evidence, and whom it is impracticable to trace or identify.⁷

A petitioner was allowed to proceed without making the alleged adulterer a co-respondent where no evidence could be obtained against him except the wife's confession that she had committed adultery with him.⁸ When the alleged adulterer is dead, the petitioner may, on giving proof of his death, proceed without making a co-respondent.⁹

The general rule with respect to adultery is that it must be distinctly alleged, and with such reasonable certainty as to enable the respondents to meet the charge. A general allegation of adultery, not specifying with whom, where, or when committed, is bad.¹ The dates, however, of the alleged acts of adultery need not be minutely specified—unless one act only of adultery can be charged, and then the date may be of great importance—but the place or places must be stated. It is sufficient, for instance, to allege in substance, that in and during the months of * * and * *, the respondent

Alleging
adultery.

⁷ *Hook v. Hook*, 1 S. & T. 183; *Quicke v. Quicke*, 2 S. & T. 419; *Peters v. Peters & Willett*, 3 S. & T. 264.

⁸ *Jinkings v. Jinkings*, L. R. 1 P. & D. 330.

⁹ *Tollemache v. Tollemache*; *Marsden v. Marsden*, 28 L. J. 2, 3.

¹ *Porter v. Porter & Jaggard*, 3 S. & T. 596.

was habitually visited at her residence at * * by the co-respondent, and on such occasions committed adultery with him. Where there have been two or more adulterers, the allegations of adultery with each of them should be stated in separate paragraphs. Where no adulterer can be named, the allegation may be to the effect that in and during the months of * * and * * the respondent has at such place or places committed adultery with a man or men unknown to the petitioner.

So also when the wife is petitioner on the ground of her husband's adultery with prostitutes who cannot be identified: she may allege that he has at such and such times and places committed adultery with divers women unknown to her.

Amending
petition.

When the petitioner is desirous to bring before the Court acts of adultery which have been discovered since, but which occurred previously to the filing of the petition, the Court may be moved for leave to amend it; or, if the acts of adultery have occurred since the filing of the petition, to file a supplemental petition; and in the latter case, the two petitions will, on summons before the Judge Ordinary in chambers, be consolidated.² Or, the issues may be tried separately.³

² *Borham v. Borham & Brown*, L. R. 2 P. & D. 193.

³ In *Cox v. Cox, Reade & Tobin*, L. R. 2 P. & D. 201, the first co-respondent appeared, but did not answer. The petition was then amended by the addition of charges against the second co-respondent, who appeared and answered. Upon his application, the Court directed the second issue to be tried separately from and before the first.

What will amount to evidence of adultery—and ^{Evidence of} these observations apply to suits both by husband and wife—must depend upon the circumstances of each case. It is, however, a fundamental rule that it is not necessary to establish the direct fact of adultery by ocular proof; for it very rarely happens that the parties are surprised in the act. In almost every case, the fact must be inferred from circumstances that lead to it by fair inference as a necessary conclusion; but what those circumstances are it is impossible to indicate universally: the only general rule that can be laid down is that they must be such as would lead the guarded discretion of a reasonable and just man to the conclusion.⁴

Where there have been great and undue familiarities between the parties, an attachment before marriage continued afterwards with criminal intention, letters indicating such intention, with opportunities of being alone together in places where they might indulge it, adultery may be presumed to have been committed.⁵

Again, though a woman may have surrendered her mind without surrendering her person, letters from a married woman containing expressions showing that she has given up her mind and affections to another man, taken in connexion with personal freedoms and opportunities of criminal

⁴ *Loveden v. Loveden*, 2 Consist. 8, 4; *Burgess v. Burgess*, 2 Consist. 223.

⁵ *Rix v. Rix*, 8 Hagg, 74; *Noverre v. Noverre*, 1 Roberts. 428; *Davidson v. Davidson*, Deane, 132.

indulgence, can generally lead to only one conclusion.⁶

Going to a
brothel.

A woman going to a brothel with a man furnishes almost conclusive proof of adultery, for she could hardly go to such a place but for a criminal purpose; but the visits of a married woman to a single man at his lodging, however imprudent, are hardly sufficient proof of adultery in the absence of letters or some circumstances showing criminal intention. In the case of a married man going to a brothel, or visiting a woman of notorious character—if such conduct does not supply an equal presumption of guilt as in the case of a woman, it furnishes a violent suspicion, only to be rebutted, if rebutted it can be at all, by the very best evidence.⁷

Venereal
Disease.

Venereal disease long after marriage is *prima facie* proof of adultery; but it can only be conclusive where there is no aspersion upon the chastity of the wife, for if she by her adulterous conduct has placed herself in such a situation that she may have been exposed to infection *aliunde*, so as to have communicated the disease to her husband, the burthen of proof is shifted, and she is then under the obligation of showing that her husband contracted the disorder from another person than her-

⁶ *Grant v. Grant*, 2 Curt. 57, 69; *Caton v. Caton*, 7 N. of C. 14; *Faussett v. Faussett*, 7 N. of C. 72; *Hamerton v. Hamerton*, 2 Hagg. 8.

⁷ *Williams v. Williams*, 1 Consist. 302; *Astley v. Astley*, 1 Hagg. 720.

self, or at all events of proving that she herself could not have communicated the disease to him.⁸

A confession of adultery, whether made in writing or verbally, is evidence of the highest character,⁹ and though uncorroborated, is conclusive against the person making it, but not against the other party to the suit with whom the adultery is alleged to have been committed.¹ The Court must, however, be satisfied that the evidence can be relied upon, and that it amounts to a clear, distinct, and unequivocal admission of adultery.

Confession
of Adul-
tery.

In *Williams v. Williams and Padfield*,² the only evidence of adultery consisted of written and verbal admissions by the respondent, and of a verbal admission by the co-respondent: the Court being satisfied, from the circumstances under which these admissions were made, and the conduct of the respondent at the time they were made, and subsequently, that they were genuine, and that there was no reasonable ground to suspect collusion, pronounced a decree.

Whatever may be the nature of the evidence, it devolves upon the petitioner to establish his case

The facts
must be
credible
and proba-
ble.

⁸ *Popkin v. Popkin*, 1 Hagg. 767; *King v. King*, 5 N. of C. 253.

⁹ *Mortimer v. Mortimer*, 2 Consist. 315; *Noverre v. Noverre*, 1 Roberts. 440.

¹ See the singular case of *Robinson v. Robinson & Lane*, 1 S. & T. 363, where the wife's entries in her diary respecting her intercourse with men would have been amply sufficient to criminate her had not the Court considered her confessions, as being on the whole, the effects of a disordered imagination.

² L. R. 1 P. & D. 29.

affirmatively, and the facts deposed to must be such as are not only possible, but reasonably credible and probable. Therefore, when a wife has behaved with propriety throughout a married life of many years, during which there has not been the least slur or suspicion cast upon her conduct, the Court will require very cogent evidence in support of a charge of adultery; especially if such adultery, as in the case of *Alexander v. Alexander* and *Amos*,³ is alleged to have been committed under circumstances showing not the slightest regard for decency or fear of detection on her part.

Evidence
of the
parties.

The Evidence Further Amendment Act, 1869,⁴ enacting that the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties shall be competent to give evidence in such proceeding, much facilitates the proof or disproof of the alleged adultery. But it is provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

³ 2 S. & T. 95. In this case the wife had been deterred from putting in an appearance, in consequence of a threat made by her husband's agent. The case having been adjourned, the Court gave her leave to appear and file an answer, and on the case coming on for rehearing, it was treated as a new and not as an adjourned case.

⁴ 32 & 33 Vict. c. 68, s. 3.

The petitioner is usually called to establish some part of the case,⁵ and under the above proviso he cannot be asked merely in cross-examination whether he has been guilty of adultery.⁶

When the husband's suit is tried before a jury, ^{Questions for jury.} there are two questions for them—whether the respondent committed adultery with the co-respondent, and whether the co-respondent committed adultery with the respondent; for there may be evidence which would affect the wife, and not be admissible against the co-respondent, and *vice versa*. This technicality may lead to no decree being made; as in *Dolby v. Dolby and Hewitt*,⁷ where the co-respondent denied the charge of adultery, but the wife did not answer the petition; the issue was therefore between the petitioner and the co-respondent only, and the jury found a verdict for the petitioner: the Judge Ordinary not being satisfied that the adultery was proved by the evidence, refused to make a decree against the wife, but allowed the petitioner to amend his case if he could.

Condoned adultery is revived by subsequent ^{Revival of condoned adultery.} adultery; and from the case of *Winscom v. Winscom* and *Plowden*,⁸ it would seem that on the part of a wife whose adultery has been condoned, subsequent misconduct and improprieties short of, but tending to adultery, would have the effect of reviving her

⁵ The petitioner should always attend the hearing of the cause, in order to be called, if necessary.

⁶ *Babbage v. Babbage & Manning*, L. R. 2 P. & D. 222.

⁷ 2 S. & T. 228.

⁸ 3 S. & T. 380.

original guilt so as to found a sentence of dissolution of marriage.

Wife's
suit on
ground of
adultery.

Where the wife sues on the ground of her husband's adultery, the charge against him ought not to be allowed to rest upon the unsupported testimony of the woman with whom the adultery is alleged to have been committed,⁹ especially if she is a person of loose character. Upon such evidence, in the case of *Ginger v. Ginger*,¹ the Court, without deciding whether the adultery had or had not been committed, dismissed the petition.

Evidence
of prosti-
tutes.

When, however, the adultery has been committed in a brothel, the evidence of prostitutes must sometimes be resorted to, for *in re lupanari, testes lupanarès admittentur*.

Detectives.

The employment of private detectives for the purpose of getting up evidence—though in some few cases they may afford useful assistance—is, as a rule, very objectionable. “They are most dangerous agents,” and the Court looks upon their evidence with much suspicion. “When a man sets up as a hired discoverer of supposed delinquencies, when the amount of his pay depends upon the extent of his employment, and the extent of his employment depends upon the discoveries

⁹ Moreover, it has been held that such a witness may claim the protection of the proviso in the 3rd section of the Evidence Amendment Act above set out, so that she is not bound to answer any question as to her alleged adultery unless she pleases. *Hebblethwaite v. Hebblethwaite*, Queen's Proctor intervening, L. R. 2 P. & D. 29.

¹ L. R. 1 P. & D. 37.

he is able to make, then that man becomes a most dangerous instrument."²

The identity of the parties to the suit, when they are not called as witnesses, must be proved either by the direct evidence of persons acquainted with them, or by circumstantial evidence.³ The Court may decline to act upon the evidence of the petitioner as to the identity of the respondent without some corroboration.⁴ In the wife's suit on the ground of adultery, it is necessary to prove the identity of the husband only: the identity of the woman is generally not material, so long as she is clearly distinguished from the wife.

Photographs or portraits, when of good size and well executed, are admissible as proof of identity, and are frequently produced for that purpose, but the small things called *cartes de visite* are trustless and ought not to be used.

A very useful process imported from the Ecclesiastical Courts is that of a decree or order of confrontation, which—though by the practice of those Courts it was confined to suits for nullity of marriage—has been extended to suits for dissolution.

² Sir C. Cresswell, in *Sopwith v. Sopwith*, 4 S. & T. p. 246-7.

The adultery intended to be relied upon, even where the wife is leading a life of prostitution, must not be brought about by persons acting on behalf of the petitioner, though without his knowledge, and instigating the woman to commit adultery in order to obtain evidence against her. See *Sugg v. Sugg & Moore*, 31 L. J. 41; *Picken v. Picken & Simmonds*, 34 L. J. 22.

³ *Rooker v. Rooker & Newton*, 3 S. & T. 526.

⁴ *Harris v. Harris & Milton*, L. R. 2 P. & D. 77.

In *Hindmarsh v. Hindmarsh* and *Hussey*,⁵ the respondent was allowed to appear and answer after the expiration of the time for entering an appearance, on condition that she would allow herself to be confronted with the petitioner's witnesses for the purpose of being identified.

And in *Lloyd v. Lloyd*,⁶ the wife's suit for dissolution of marriage, it being necessary for the witnesses on the part of the husband to be confronted with the petitioner to enable him to establish his defence, and he being unable to ascertain her address: the Court ordered the petitioner to supply to him her address within three days, or to attend at the hearing.⁷

Co-respondent is generally condemned in the costs.

By the 34th section of the Divorce Act, whenever in any petition presented by a husband, the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, it shall be lawful for the Court to order the adulterer to pay the whole or any part of the costs of the proceedings.

Generally speaking, the co-respondent has been or appears to have been the seducer, and the Court will mulct him in the whole costs by way of penalty for his misconduct in having rendered the suit necessary; but to this rule, there are some exceptions, and it by no means follows that because

⁵ L. R. 1 P. & D. 24.

⁶ L. R. 1 P. & D. 222.

⁷ By the 43rd section of the Divorce Act, the Court may, if it shall think fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined or cross-examined on oath on the hearing of any petition.

the co-respondent has been found guilty, he must therefore pay the costs; and the Court will in its discretion take into consideration the conduct of the husband and wife as well as that of the adulterer, and either acquit the latter from the costs, or divide the liability between the parties.⁸

The principal exception in favour of the co-respondent occurs when no evidence can be given to show that he knew the respondent to be a married woman, or where she has been leading a profligate life previously to her connexion with him;⁹ for it would obviously be very unjust to make a man pay the costs of a divorce suit as a penalty for picking up a woman in the streets. In *Nelson v. Nelson* and *Howson*,¹ the petitioner and respon-

Excep-
tions.

⁸ In *Codrington v. Codrington & Anderson*, 4 S. & T. 63; 34 L. J. 60, the verdict established the adultery of the respondent and co-respondent, and her adultery with another man, and rejected a charge against the petitioner of conduct conducing to her adultery: the Court considering that the conduct of the petitioner had been such as to invite reasonable challenge, condemned the co-respondent in the costs only of proving the adultery against him, leaving the petitioner to pay the costs of the other issues.

Where a jury, being unable to agree, were discharged without giving a verdict, and on a second trial, the petitioner obtained a verdict, and a decree was pronounced condemning the co-respondent in costs: the Court refused to include in those costs the costs of the first trial. *Wood v. Wood & Stanger*, L. R. 1 P. & D. 467.

⁹ *Teagle v. Teagle & Nottingham*, 1 S. & T. 188; *Priske v. Priske & Goldby*, 4 S. & T. 238; *Boyd v. Boyd & Collins*, 1 S. & T. 562.

¹ L. R. 1 P. & D. 510.

dent had lived apart for several years in consequence of her intemperance, and during the separation and before the adultery proved, she had been leading an abandoned life: the Court, notwithstanding that the co-respondent was proved to have known that the respondent was a married woman, refused to condemn him in costs.

Some degree of remissness on the part of the husband in his conduct towards his wife is no excuse for the adulterer;² nor will he be relieved from costs merely because the husband has been guilty of adultery, as in *Bremner v. Bremner* and *Brett*,³ where the petition was dismissed on that ground, but the co-respondent was ordered to pay the costs incurred by the husband in respect of the issue of adultery found in his favour; and in *Conradi v. Conradi* and *Flashman*,⁴ under similar circumstances, the co-respondent was held responsible for the costs of proving the adultery committed by him with the respondent; and the petitioner for the costs incurred by the co-respondent in establishing a countercharge of adultery against him. But in cases where the petition has been dismissed on the grounds of wilful neglect and misconduct conducing to adultery, or on the ground of connivance on the part of the petitioner, although the adultery has been proved against the co-respondents, the Court has refused to make

² *Badcock v. Badcock & Chamberlain*, 1 S. & T. 189.

³ 3 S. & T. 378.

⁴ L. R. 1 P. & D. 163.

any order as to costs as between the co-respondent and the petitioner.⁵

In other cases also, costs have either been refused against the co-respondent, or no order has been made; as, where the petitioner had condoned his wife's adultery with one co-respondent, which was revived by her adultery with another, costs were refused against the co-respondent whose adultery had been condoned.⁶ In *Carstairs v. Carstairs*, *Dickenson*, and *others*,⁷ the respondent was found guilty with one co-respondent; but two co-respondents who were not proved to have been guilty of the adultery charged, but had acted with great imprudence towards the respondent, whom they knew to be a married woman, were left to pay their own costs.

In *Manton v. Manton and Stevens*,⁸ the petitioner made a claim for damages against the co-respondent, which he was obliged at great expense to resist by showing that the respondent at the time he made her acquaintance, was leading an abandoned life, a fact of which it appeared that the petitioner must have been aware: the Court made no order whatever as to costs.

⁵ *Seddon v. Seddon & Doyle*, 2 S. & T. 640; *Ellyatt v. Ellyatt, Taylor & Halse*, 3 S. & T. 503. So in *Hick v. Hick & Kitchen*, 34 L. J. 11, where the adultery was proved, but the petition was dismissed on the ground of the gross misconduct of the petitioner, the Court refused to make any order as to the costs of the petitioner or of the co-respondent.

⁶ *Norris v. Norris, Lawson & Mason*, 4 S. & T. 237.

⁷ 3 S. & T. 538.

⁸ 4 S. & T. 159; 34 L. J. 121.

Petitioner
liable to
pay co-re-
spondent's
costs.

In some cases—as where the suit is improperly instituted, or upon insufficient grounds—the petitioner is liable to be condemned in the costs of the co-respondent: as in *Adams v. Adams* and *Colter*,⁹ where the petition claiming damages was dismissed on the grounds of connivance and condonation; the petitioner was ordered to pay the co-respondent his costs, though the adultery with the respondent was proved.

In *Whitmore v. Whitmore* and *Brettell*,¹ there was no evidence connecting the co-respondent with the respondent, except that of two witnesses, whose testimony did not satisfy the jury that adultery had been committed, and they were discharged without giving a verdict: the petitioner did not go to a second trial, and the petition was dismissed: the Court condemned the petitioner in the co-respondent's costs.² But in *Wight v. Wight* and *Field*,³ where no witnesses were called by the respondent or co-respondent, and the jury being unable to agree, were discharged without giving a verdict, and the issues came on for trial a second time, when witnesses were called by the co-respon-

⁹ L. R. 1 P. & D. 333.

¹ L. R. 1 P. & D. 25.

² But in *Bancroft v. Bancroft & Rumney*, 34 L. J. 144, where though the petitioner had a strong case against the co-respondent, the jury were discharged without giving a verdict, and the petitioner was unable or unwilling to go to a second trial, having to pay the respondent's costs in his own suit, as well as in a cross-suit by her; the Court declined to order him to pay the co-respondent's costs.

³ L. R. 1 P. & D. 368.

dent, and the jury found a verdict in his favour; the Court refused to condemn the petitioner in the co-respondent's costs of the first trial.

Again, in *West v. West and Parker*,⁴ the alleged adulterer was called as a witness, and merely denied the charge without explaining his conduct. The jury were unable to agree, and the issue was tried a second time. On the second trial, the co-respondent was again examined, and then entered into full explanations, and the jury found that he was not guilty. The Court however refused to condemn the petitioner in his costs, on the ground that he had by his reticence on the first trial and by his suspicious conduct, made the second trial necessary.⁵

The petitioner may also be called upon to pay the co-respondent's costs where he applies for leave to withdraw his petition altogether, or as against the co-respondent,⁶ as is sometimes done for want of sufficient evidence.

So also where a suit instituted by the wife is ended before the hearing by her returning to co-

⁴ L. R. 2 P. & D. 196.

⁵ In this case an attempt was made to distinguish a petition containing a claim for damages from a petition containing no such claim, with respect to the co-respondent's liability to pay costs when the petition is dismissed; but the Court held that there is no such distinction, and that its discretionary power is the same in all cases. See ss. 34, 51 of the Divorce Act.

⁶ *Symons v. Symons & Pike*, 2 S. & T. 435, where the application was made on behalf of the respondent and co-respondent on an affidavit by the petitioner, that he had abandoned the suit.—*Smith v. Smith & Millet*, 34 L. J. 11.

habitation, and the husband then applies to have it dismissed, he is liable to pay her costs.⁷

Respondent liable to pay costs.

When the respondent has separate property, the Court may under the 51st section of the Divorce Act,⁸ order her to pay the costs of the proceedings, especially if it appears that she is without excuse, and that the petitioner was free from blame; as in *Milne v. Milne* and *Fowler*,⁹ where the respondent pleaded various charges against the petitioner which she withdrew at the hearing, and the co-respondent made no defence: a verdict was found for the petitioner upon all the issues, and damages were assessed at £1500. The Court condemned the co-respondent in the costs of the issues found against him; and as it appeared that the respondent had a separate income of £4,100, while the petitioner had but a moderate income, condemned her in the costs

⁷ *Cooper v. Cooper*, 3 S. & T. 392. In *Dixon v. Dixon*, L. R. 2 P. & D. 253, the wife had petitioned for dissolution of marriage, and the husband had appeared and answered: an application on his behalf that the petition might be dismissed on an affidavit by the wife that the suit had been improperly instituted, and that she had returned to cohabitation, was ordered to stand over for a fortnight, that the wife's attorney might tax his costs against the husband.

⁸ "The Court, on the hearing of any suit, proceeding or petition under this Act . . . may make such order as to costs as to such Court may seem just." An application for costs against the respondent under this section must be made *at the hearing*, unless an adjournment for that purpose is asked for. *Wait v. Wait & Flower*, L. R. 2 P. & D. 228, where such an application after the decree had been made absolute, was refused.

⁹ L. R. 2 P. & D. 202.

arising out of her pleas and the issues found against her.

The ground on which the petitioner is entitled to claim damages from the adulterer is that he has been the seducer of his wife; and the petitioner has a right to recover damages up to the extent of the injury he has received in being deprived of the comfort of her society by that seduction. It devolves upon the petitioner to show—in accordance with the practice in the action for criminal conversation now in name extinct¹—that he has treated his wife in such a manner that the jury ought to

Damages:
principles
on which
they are
claimed
and
assessed.

¹ The action for criminal conversation—that is for pecuniary compensation for the seduction of a wife—abolished by the 59th section of the Divorce Act, is in effect restored by the 33rd section, which enacts that “any husband may either in a petition for dissolution of marriage, or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner,” and that “the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided in Courts of common law.” This section has, however, never been acted upon in its “limited” sense, and damages are never claimed from an adulterer except in suits for dissolution of marriage.

When the respondent appears and denies the adultery, and the co-respondent does not appear, no evidence which is not admissible against the respondent—such as a letter from the co-respondent to the petitioner—can be given to show that the respondent has been guilty of adultery; but evidence in aggravation of damages is admissible. *Stone v. Stone & Appleton*, 3 S. & T. 608.

deal liberally with him ;² and in assessing damages they have therefore to take into consideration the position of the parties, the terms on which they lived together, and the circumstances attending the seduction of the wife. But the damages are not to be measured by the ability of the co-respondent to pay, and evidence cannot properly be given of his property: it is not a question in the cause.³

The Court and the parties to the suit are bound by the finding of the jury, and the Court will not recognise any private arrangement come to between the parties as to the amount of damages to be paid.⁴

A co-respondent who has appeared but has not answered is not entitled to cross-examine the petitioner's witnesses, or to address the jury on the question of damages: but in *Lyne v. Lyne & Blackney*, L. R. 1 P. & D. 508, after the damages had been assessed and the decree nisi pronounced, the co-respondent was allowed to recall and cross-examine the witnesses and address the Court on the question of costs.

² *Narracott v. Narracott & Hesketh*, 3 S. & T. 410.

³ *James v. Biddington*, 6 Car. & P. 589. In *Cowing v. Cowing & Wollen*, 33 L. J. 150, it was said that "if the adulterer had used his wealth as a means of seduction, the jury might take it into account." In *Bell v. Bell & Marquis of Anglesea*, 1 S. & T. 565, the position of the petitioner with regard to the marriage settlements—£5000 having been settled to Mrs. Bell's separate use—was allowed to be submitted to the jury for their consideration in assessing the damages.

⁴ *Callwell v. Callwell & Kennedy*, 3 S. & T. 259, where pending the trial, an arrangement was entered into between the counsel for the petitioner and co-respondent, to the effect that whatever sum the jury might give, the amount to be paid should be £1500.

It is one thing to get damages assessed, and another to recover them, and it was formerly held that the Court had no power to direct that they should be paid into Court, nor to order immediate execution against the co-respondent;⁵ so that he could sell off his property and go abroad. But in *Pritchard v. Pritchard and Bean*,⁶ on an affidavit that the co-respondent had removed his furniture and other effects from his residence, the Court made a peremptory order that the damages should be paid to the petitioner within two days, and that if they were not paid within that period, a writ of *fi. fa.* should issue forthwith.⁷ And in *Patterson v. Patterson and Graham*,⁸ an order was made that the damages awarded should be paid into the registry of the Court within a certain time. Before the order had been made, the co-respondent became a bankrupt, and a trustee of his property was appointed. The damages were not paid into the registry, and proof of them as a debt was not allowed under the bankruptcy. In order to facilitate such proof, the Court rescinded its former order, and directed that the damages should be paid to the petitioner himself.

How recovered.

⁵ *Pounsford v. Pounsford & Bulpin*, 2 S. & T. 389.

⁶ L. R. 2 P. & D. 53.

⁷ In *Bent v. Bent & Footman*, 30 L. J. 189, damages having been awarded and the decree suspended in order that the petitioner should make a provision for the respondent; on its appearing that from the circumstances of the co-respondent, the damages might be lost, the Court ordered them to be paid to the petitioner within ten days from the service of such order.

⁸ L. R. 2 P. & D. 189.

Adding or
abandon-
ing claim
for
damages.

The petitioner may be allowed to amend his petition by adding a claim for damages, where, after filing his petition, he obtains stronger evidence which may justify him in making such a claim;⁹ and on the other hand, he may abandon the claim, either on moving for directions as to the mode of trial, or at the hearing of the cause.

Wife's
suit.

I proceed to consider, first, those offences which alone entitle the wife to a dissolution of marriage; secondly, those which, combined with adultery, entitle her to a dissolution of marriage, or independently, to a decree of judicial separation.

Incestuous
adultery.

Incestuous adultery means adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity.¹ Upon this head, it is only necessary to add that adultery so committed is not the less incestuous by reason of the woman so related being illegitimate.²

Incestuous adultery which has been condoned will be revived by ordinary adultery so as to found a suit for dissolution.³

⁹ *Bartlett v. Bartlett & Balmano*, 34 L. J. 64; *Henslow v. Henslow & Beardsley*, 40 L. J. 31.

¹ Divorce Act, s. 27.

² *The Queen v. the Inhabitants of Brighton*, 1 B. & S. 447, where the marriage of a man with the daughter of the illegitimate half-sister of his deceased wife was held null and void under 5 & 6 Wm. IV. c. 54.

³ *Newsome v. Newsome*, L. R. 2 P. & D. 306.

Bigamy means the marriage of any person being married, to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of her Majesty or elsewhere.⁴ To establish bigamy as a ground for dissolution of marriage, proof must be given of such a ceremony as, but for the former marriage, would have constituted a valid marriage. If the alleged bigamy has taken place in a foreign country, the marriage law of that country must be formally proved. The bigamy and adultery must have taken place with the same woman: a bigamous marriage with one woman and adultery with another would not constitute "bigamy with adultery" within the meaning of the statute. The bigamy must be proved: proof that the husband has been convicted of bigamy will not suffice.⁵ But where there has been a conviction, and the witnesses to prove the bigamy reside at a great distance and cannot be produced without considerable expense, the Court may permit the bigamy to be proved by affidavit.⁶

Rape may be proved by the person upon whom the offence was committed, and if there has been a conviction, evidence may be given of it by way of corroboration.

What has been stated respecting bigamy and

⁴ Divorce Act, s. 27.

⁵ *Burt v. Burt*, 2 S. & T. 88; *Horne v. Horne*, 2 S. & T. 48; *March v. March*, 2 S. & T. 49.

⁶ *March v. March*, 2 S. & T. 49; *Macartney v. Macartney*, L. R. 1 P. & D. 259.

rape applies equally to the other criminal charges, sodomy and bestiality,⁷ which must in like manner be proved independently of any conviction.

CRUELTY—WIFE'S SUIT—CONDUCT ON HER PART
PROVOKING CRUELTY---HUSBAND'S SUIT.

Not to be
defined.

In treating of this subject, I shall not add another to the numerous attempts which have been made to define legal cruelty: it can only be described generally, and rather by effects produced than by acts done.⁸ Much must depend upon the

⁷ Sodomy is the unnatural connexion of a man with mankind: bestiality is a similar connexion with an animal. See Archbold's Criminal Pleading.

⁸ In *Evans v. Evans*, 1 Consist. p. 37, Lord Stowell said: "What is cruelty? . . . the causes must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and in obligation: but what falls short of this is with great caution to be admitted. The rule of *per quod consortium amittitur* is but an inadequate test; for it still remains to be enquired, what conduct ought to produce that effect? whether the *consortium* is reasonably lost; and whether the party quitting has not too hastily abandoned the *consortium*? What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied with bodily injury either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty: they are high moral offences in the marriage state undoubtedly, not innocent surely in any state of life, but

station in life, the ages, the habits and education of the parties, for what might be endured by some would be intolerable to others. A blow between persons in the lower conditions and in the highest stations of life bears a very different aspect. Brutal and insulting language and gross indignities will be more acutely felt and more deeply resented by persons of refinement than by those whose bringing up having been coarse in all matters, are inclined to treat such things as almost matters in course.

According to the principles laid down by the Ecclesiastical Courts, and acted upon by the present Court, there must be *danger of life, limb, or health*: something which renders cohabitation unsafe, or is *likely* to be attended with injury to the person or to the health of the complaining party.⁹ General principles.

still they are not that cruelty against which the law can relieve."

⁹ In stating cruelty in the petition, the various acts and conduct intended to be relied upon should be distinctly, but concisely, set forth in separate paragraphs, but it is not necessary that each paragraph should in itself allege an independent act of cruelty sufficient to found a sentence; (*Suggate v. Suggate*, 1 S. & T. 489; *Leete v. Leete*, 2 S & T. 568.) and besides stating the leading acts, it is quite proper to allege that the respondent "otherwise treated the petitioner with great cruelty," and under this averment, evidence of details may be given, which though separately of slight importance, may in the aggregate amount to legal cruelty. In like manner, evidence of violent demeanour and language leading up to and making probable acts of violence may be admissible though not specifically pleaded, but in other respects, the evidence must be limited to the occasions and matters speci-

The Court has never been driven off this ground, and in no case has a divorce been granted without proof being given of a *reasonable apprehension* of bodily hurt: but the apprehension must be reasonable, and not arising merely from an exquisite and diseased sensibility of mind. Whenever there is a tendency only to bodily mischief, it is a peril from which the wife must be protected, because it is unsafe for her to continue in the discharge of her conjugal duties, and to enforce that obligation upon her, might endanger her security, and perhaps her life; for in all these cases, it must be remembered that the ground of the Court's interference is the wife's safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread.¹

fied. *Jewell v. Jewell*, 2 S. & T. 573; *Squires v. Squires*, 3 S. & T. 541.

If the charges are too general, the respondent may apply on summons before the Judge Ordinary in chambers for particulars.

Cruelty being a matter specially within the knowledge of the petitioner, the acts and conduct intended to be proved should be stated once for all: the Court is very reluctant to allow a petition on this ground to be subsequently amended by alleging fresh charges.

When the question of cruelty is tried before a jury, the Court directs the jury what constitutes legal cruelty, and the jury have to determine in accordance with that direction whether the acts were done and whether they amount to cruelty. *Tomkins v. Tomkins*, 1 S & T. 168.

¹ *Evans v. Evans*; *Holden v. Holden*, 1 Consist. 35, 453; *Harris v. Harris*, 2 Consist. 148. In *Milford v. Milford*, L. R. 1 P. & D. 295, the wife's petition for dissolution of marriage, the adultery was established: with respect to the cruelty, it was proved that the respondent had, whilst in bed

What must be the extent of injury, or what will reasonably excite apprehension, will depend upon the circumstances of each case. So likewise what may aggravate the character of ill-treatment, must be deduced from various considerations—in some degree from the station of the parties—in some degree from the condition of the person suffering at the time of the infliction. The complexion of individual acts may be heightened, nay, the acts may almost change their very essence by the accompaniments.² Not only particular stations and situations, and the feelings almost necessarily arising out of them, but even acquired feelings may be entitled to some attention.³

Station in
life of the
parties.

with the petitioner, placed a pillow over her head, which she immediately threw off; and that during an altercation between them, arising from the wife's jealousy, the respondent had taken up a poker, and had threatened to dash out her brains with it, but that on her telling him to put it down he did so. The parties lived together some time after this. The Court held that as there was nothing in the evidence to induce the conclusion that the petitioner's safety was compromised, or any fears for it entertained even by herself, the only relief it could afford was a judicial separation on the ground of adultery. Affirmed on appeal to the House of Lords. 37 L. J. H. of L. 77.

² In *Lockwood v. Lockwood*, 2 Curt. 281, the Court took into consideration the wife's state of health and acute suffering, and the danger to her health which might be expected from further cohabitation with her husband, who from irritability of temper had occasionally lost command over himself, and had been on more than one occasion guilty of personal violence towards her.

³ *Westmeath v. Westmeath*, 2 Hagg. Suppt. 1, and on appeal, 61. The cruelty imputed, as stated in the judgment,

The observations of Dr. Lushington in *Dysart v. Dysart*,⁴ seem applicable to this part of the subject.

Denial of
necessaries
and com-
forts.

“The denial of necessaries and comforts, even of medical assistance when there are no pecuniary resources, never can be construed into acts of cruelty; but no one could, I think, entertain a reasonable doubt that such a denial, when the fortune was ample, might probably under circumstances be considered differently. It also appears to me equally clear that necessaries and comforts must have some relation to the rank and station of the parties: where they are in totally different ranks of life, the words ‘necessaries and comforts’ imply not the same things, the want of some would operate altogether differently. A wife brought up as a gentlewoman would suffer in her health and

p. 73-4, was “not that of cold malignity, or savage, continual, unfeeling brutality of disposition; it is not that of satiated possession producing disgust and hatred: the acts charged are not inconsistent with occasional kindness, with the existence and continuance of strong attachment; nay, even with violent affection; but the main features of the alleged cruelty are great irritability of temper, producing ungovernable passion, ending occasionally in acts of personal violence, and of course attended with the danger of a repetition of personal mischief.”

⁴ See this case, *passim*, 1 Roberts. 106, and on appeal, 470; as to acts of violence, coarse and brutal conduct and language; and especially the strange and eccentric disregard of all the comforts and conveniences befitting the rank and station of the parties to which Lord Dysart exposed his wife, and by which he injured her health, and in the opinion of the Court rendered her return to cohabitation dangerous.

constitution, nay even her life might be endangered by a mode of living which would be comfortable to a female in a different mode of life."

Words of menace, importing the actual danger ^{Threats.} of bodily harm, will justify the interposition of the Court; as the law is not to wait till the threats are carried into execution, till the mischief is actually done; but is to interpose where the words are such as might raise a reasonable apprehension of violence and excite such fear and terror as make the life of the wife intolerable.⁵

On the other hand, words of abuse and reproach ^{Abusive language.} however irritating, blasphemous language however disgusting, and habits of intoxication however annoying to the wife, without bodily ill-treatment, or threats of it, are not legal cruelty.⁶

⁵ *Oliver v. Oliver*; *Kirkman v. Kirkman*, 1 Consist. 361, 409; *D'Aguilar v. D'Aguilar*, 1 Hagg. 775, *in notis*. In this case Lord Stowell said, "It appears to me that if words of serious menace importing bodily harm be legal cruelty, it does not differ much whether they be addressed to the person herself, or to a third person: the test is, if they raise reasonable apprehension; indeed they carry with them something of additional strength, if they raise apprehension in others, for that shows the wife was not alarmed upon any unreasonable grounds." In *Hulme v. Hulme*, 2 Add. 27, the husband "threatened to cut his wife's arm off, and beat her brains out with it," and a few days after her confinement "to pull her out of bed and kick her up and down the room."

⁶ *Chesnutt v. Chesnutt*, 1 Eccl. & Adm. p. 198; *Geils v. Geils*, 6 N. of C. p. 135; *Greenway v. Greenway*, 6 N. of C. 221, where habitual harshness, violent language—such as, calling his wife an "idiot," "bitch," "liar," "whore," without direct proof of personal ill-usage, were held insufficient.

A groundless accusation of incest against the wife, if

Habits of
intoxica-
tion.

In *Hudson v. Hudson*,⁷ where the burthen of the wife's complaint was that her husband was much given to habits of intoxication; that he was apt to be on slight provocation rough and coarse in his language to her at most times, and very violent and abusive to her at some—the Judge Ordinary, in dismissing her petition, observed: "It cannot be too widely known that this Court has neither the power nor the inclination to deal with the mere unhappiness of ill-assorted marriages, or the destruction of domestic comfort by the detestable vice of drinking."⁸

But in *Marsh v. Marsh*,⁹ where the husband had for years led a life of gross intemperance, had suffered from delirium tremens, and had on such occasions inflicted bodily injury on his wife, and by his general conduct materially injured her health; it was held that she could not return to cohabitation without great peril of a renewal of such injuries, and was therefore entitled to a separation. Again, in *Power v. Power*,¹ the Court took into consideration the chances of danger which the wife would incur by returning to cohabitation with her husband who in his fits of drunkenness was uncontrollable, the acts of violence he had been

persevered in, may with other acts constitute a case of cruelty. See *Bray v. Bray*, 1 Hagg. 163; *Gale v. Gale*, 2 Roberts. 423.

⁷ 3 S. & T. 314.

⁸ In *Brown v. Brown*, L. R. 1 P. & D. p. 50, the Judge Ordinary said: "A decree that should establish habitual drunkenness to be itself a ground for judicial separation would be likely to have a wide application."

⁹ 1 S. & T. 312.

¹ 4 S. & T. 173.

guilty of towards her having been caused not by ill-will, but under the influence of drink.

It follows therefore that if the passions of the husband are so much out of his own control, as to prevent the wife continuing in his society consistently with her personal safety, it matters little from what sources such violence may have originated²—unless, indeed, an act of violence were committed under the influence of an acute disorder, such as brain fever, and it were made clear that the disorder having been subdued, there was no danger of a recurrence of such acts. But if the result of such a disease has been a new condition of the brain, rendering the party liable to fits of ungovernable passion, which would be dangerous to the wife, then, undoubtedly, the Court is bound to emancipate her from such peril.³

The cause
of violence
unimportant.

² In *Dysart v. Dysart*, 1 Roberts. 116, Dr. Lushington says: "When I find conduct towards a wife likely to prove dangerous to her safety, but not in other cases, I shall consider it within my cognizance, whatever may have been the cause thereof, whether having arisen from natural violence of disposition, from want of moral control, or from eccentricity. It is for me to consider the conduct *itself*, and its probable consequences; the motives and causes cannot hold the hand of the Court, unless the wife be to blame, which is a wholly different consideration. In plainer words, even if I were satisfied that conduct dangerous in itself arose from morbid feelings, out of the control of the husband, I must act, if the danger exist, though it is not my province to inquire into or ascertain such cause."

³ *Curtis v. Curtis*, 1 S. & T. p. 213.

But though the Court does not hold its hand to inquire into motives and causes, yet where the evidence on behalf of the petitioner disclosed facts from which the respondent's

Cruelty in general cumulative, but may consist of one act of violence.

Although generally, cruelty lies in the cumulative ill-conduct which the history of the married life discloses, yet the *law* does not require that there should be many acts. The Court is indisposed to interfere on account of one slight act, particularly between persons who have been long under cohabitation; because if only one such instance of ill-treatment, and that of a slight kind, occurs in many years, it may be hoped and presumed it will not be repeated. But, if one act should be of that description which should induce the Court to think that it is likely to occur again, and to occur with real suffering, there is no rule that should restrain It from considering that to be fully sufficient to authorize its interference;⁴ as in *Reeves v. Reeves*,⁵ where a widow married a young man whose discharge from the army she had purchased, and who, on the only occasion they came together after the marriage, kicked and otherwise grossly ill-used her—the Court granted a decree,

insanity might be inferred, It required to be satisfied that such facts admitted of a different explanation before making a decree; observing that “An insane man is likely enough to be dangerous to his wife’s personal safety, but the remedy lies in the restraint of the husband, not the release of the wife. Though the object of this Court’s interference is safety for the future, its sentence carries with it some retribution for the past. In either aspect, it would be equally unjust to act on the excesses of a disordered brain: in the latter, for the insane are not responsible; in the former, for insanity may be cured and the danger at an end.”—*Hall v. Hall*, 3 S. & T. 347.

⁴ *Holden v. Holden*, 1 Consist. p. 458.

⁵ 3 S. & T. 139; 32 L. J. 178.

being of opinion, from the habits and general conduct of the respondent, that the wife would be in great danger of further ill-usage if she lived with him.

But in *Smallwood v. Smallwood*,⁶ where the alleged cruelty consisted of one act of violence which occurred in an altercation arising out of the husband's jealous suspicions, when he took his wife by the throat, shook her, and threw her down; but it did not appear that any marks were left, or that she was rendered ill in consequence; the petition was dismissed.

Jealousy, whether well or ill-founded, is a fertile source of domestic squabbles: the wife complains of her husband's real or supposed infidelities; remonstrances lead to quarrels, and quarrels to violence; though in many such cases, a woman's best weapons would be submission, civility and kindness.

Jealousy
leading to
violence.

In *Anthony v. Anthony*,⁷ the wife's petition for judicial separation, the acts of violence admitted by the husband took place in disputes arising, at least in part, out of the wife's jealousy of a maid servant; and the Court took into consideration the position in which the wife was placed in the family by reason of the authority which the servants exercised over her by the direction of her husband, and the state of her feelings arising from reasonable suspicion of undue familiarity between her husband and the maid servant.

But, on the other hand, indifference, neglect,

⁶ 2 S. & T. 397.

⁷ 1 S. & T. 594.

aversion to the wife's society, cessation of matrimonial intercourse on the part of the husband, even though he is carrying on an adulterous intercourse with a servant under the same roof where he is residing with his wife, do not constitute legal cruelty; unless in connexion with such adultery, he is guilty of acts of violence towards his wife, causing her mental and bodily suffering.⁸

In *Swatman v. Swatman*,⁹ where the evidence of actual violence on the husband's part was not of itself sufficient to warrant the charge of cruelty; but the wife had been subjected to a continued course of ill-treatment and degradation — daily

⁸ *Cousen v. Cousen*, 4 S. & T. 164; 34 L. J. 139: *Knight v. Knight*, 4 S. & T. 103; 34 L. J. 112.

In *Popkin v. Popkin*, 1 Hagg. suppt. 768, *in notis*, Lord Stowell observed: "the attempts to debauch his own women servants was a strong act of cruelty; perhaps not alone sufficient to divorce, but which might weigh in conjunction with others as an act of considerable indignity and outrage to his wife's feelings. The attempt to make a brothel of his own house was brutal conduct of which the wife had a right to complain."

In *Smith v. Smith*, 2 Phill. 207, the cruelty as stated in the judgment consisted in "violence preceded by deliberate insult and injury, . . . the forming an adulterous intercourse with her maid, the keeping that servant in the house notwithstanding the remonstrances of his wife and friends, the deposing his wife from the management of his family and vesting it in this prostitute; and the forcibly taking the child from his wife's care merely to distress his wife."

Adultery committed in the "household" has not yet been held to be legal cruelty.

⁹ 4 S. & T. 135.

intoxication with late hours at night; women of the town brought home to his own door, and on more than one occasion introduced into his bed; adultery committed with his female servants under his own roof while his wife was then confined, and familiarity with them even in his wife's presence—the Court dissolved the marriage.

The communication by the husband of venereal disease to the wife *knowingly* and *wilfully*, is a gross act of cruelty.¹ The wilfulness must be judged of from the surrounding circumstances, the condition of the husband, and the probabilities of the case after such explanations as he may offer.² *Primá facie*, however, his state at the time of the infection must be presumed to be within his own knowledge, though he may rebut this by his own evidence or by other proof.³

¹ This charge must be distinctly alleged in the petition:—“that on or about [such a date] the respondent knowingly communicated to your petitioner a certain venereal disease.” In *Squires v. Squires*, 3 S. & T. 541, the petition alleged that the respondent had “by neglecting the petitioner, by violently pushing her, by striking her with his fist, by depriving her of food, and otherwise, treated her with great cruelty.” The Court refused to admit evidence under this allegation, that the respondent had infected the petitioner with venereal disease.

² The evidence must be “strong and conclusive,” especially if the charge is defended. *Collett v. Collett*, 1 Curt. 678. The testimony of the parties to the suit is not alone sufficient, but must be supported by medical evidence of the condition of the petitioner, and, if possible, also of the respondent at the time of the alleged infection.

Brown v. Brown, L. R. 1 P. & D. 46.

Must have
been
actually
communi-
cated.

Wilfully
or
recklessly.

To constitute what may be termed venereal cruelty, the wife must have been infected—there must have been an actual communication of the disease by the husband—the merely running the risk is not sufficient. The communication need not be actually wilful: it may be reckless. If a man marries, who has been suffering from venereal disease some time immediately before the marriage; or if a husband, knowing himself to be in such an ill state that by having intercourse with his wife, he will run the risk of communicating such disease to her, recklessly has intercourse with her, and thereby communicates the disease, it is, to use the mildest term applicable to such conduct, such *utter recklessness of the health and comfort of his wife*, that he is guilty of cruelty in the eye of the law; upon the principle that whoever does an act likely to produce injury, and the injury follows, can never excuse himself by saying that he hoped a probable consequence might by some peculiar good fortune, not follow.⁴

Difficulty
of proof.

But, on the other hand, the mere fact that a husband has communicated disease to his wife, is not sufficient to constitute legal cruelty. The difficulty of proving the *wilfulness*, or at least the *recklessness* which must be inferred from knowledge in the husband of having such a complaint, where, as in cases of secondary syphilis, the symptoms may escape observation, was shown in the

⁴ *Ciocchi v. Ciocchi*, 1 Eccl. & Adm. 121. *Jones v. Jones*, S. & S. 138. *Boardman v. Boardman*, L. R. 1 P. & D. 233.

case of *Morphett v. Morphett*.⁵ The evidence was to the effect that a few months after marriage, the parties separated; that the wife was examined by a surgeon who found her to be affected with certain symptoms which indicated that she was suffering from secondary syphilis; that a child was born similarly affected; that the husband was examined by medical men who disproved any trace of such a disease in him; and he positively denied that he had ever had it. On the other hand, there was no imputation against the chastity of the wife either before or after marriage. At the hearing, the jury gave a verdict in favour of the wife, and came to the conclusion that the disease proceeded from the husband.

A rule for a new trial having been argued before the Full Court, it was held that it devolved upon the wife to establish affirmatively that her husband having the disease himself, knew either from medical advice, or from the obvious character of the symptoms, that he had a disease, that it was an infectious disease, and that it existed in such a stage and form that intercourse with his wife was, at least, distinctly dangerous.⁶

⁵ L. R. 1 P. & D. 702.

⁶ Willes, J., who dissented, said in concluding his judgment: "In the result, I think there was evidence from which the jury might properly conclude: first, that the disease was communicated to the wife by the husband, under circumstances calling upon him for an explanation; and secondly, that the explanation attempted was untrue and ought to be rejected; except, indeed, so far as the assertion of a falsehood gives rise to the inference of guilty motives for keeping back the truth." L. R. 1 P. & D. p. 708.

This ruling is however strictly applicable only to defended cases. Where the husband does not appear, his guilt will, upon reasonable proof being given of the charge, be assumed against him.⁷

Cutaneous
complaint.

What has been stated with respect to venereal disease, applies, though less strongly, to a cutaneous complaint, which, if knowingly and wilfully communicated, has been held to be an act of cruelty, but not such an act of cruelty as if it stood alone, would require the Court to pronounce, or perhaps justify it in pronouncing, a sentence of separation.⁸

Unnatural
connexion.

Unnatural connexion, if it could be proved, would be an act of cruelty, but the case of *Geils v. Geils*⁹ illustrates the gross improbability of the

⁷ In a recent case in which I was of counsel for the wife in a suit by her on the ground of adultery and cruelty, it was proved by the evidence of the petitioner and of the surgeon who attended her that she had suffered very shortly after marriage from all the symptoms of virulent gonorrhœa. No medical evidence could be given respecting the condition of the husband; and as, though he had by his answer denied the charges, he did not appear at the hearing; the jury, under the direction of the Judge Ordinary, at once found a verdict for the petitioner.

There may however be much difficulty in establishing such a charge when its denial entails strict proof upon the person alleging it; for it seems to be admitted by medical men that there are no *certain* means of distinguishing gonorrhœa from similar symptoms caused by inflammation.

⁸ *Chesnutt v. Chesnutt*, 1 Eccl. & Adm. 205.

⁹ 6 N. of C. 97, 163. So in *N. v. N.* 3 S. & T. 234, where a similar charge was made, Sir C. Cresswell said: "The crime here imputed is so heinous and so contrary to experience

act. The medical evidence was to the effect "that it is absolutely and physically impossible for such connexion to take place without the passive consent and acquiescence of the woman, as the least motion on her part would prevent it, and unless actual force were used—that is, actual violence or the woman were deprived of all power of resistance—such connexion could not take place."

Spitting in the wife's face is a gross act of cruelty, ^{Spitting in the face.} and combined with other acts of violence, indignity, or threats of violence importing danger to person or to health, has been held sufficient to found a decree,¹ but what would be the effect of such an act taken by itself has not been decided, for here again, much must depend upon the social condition of the persons who are capable of provoking or inflicting such wanton outrages.²

that it would be most unreasonable to find a verdict of guilty where there is simply oath against oath without any further evidence, direct or circumstantial, to support the charge."

The commission by the husband of sodomy with another person, coupled with neglect of and unkindness towards his wife—as being conduct *per quod consortium amittitur*—has been held to constitute legal cruelty. See *Mogg v. Mogg*, 2 Add. 292.

¹ *D'Aguilar v. D'Aguilar*, 1 Hagg. 776; *Otway v. Otway*, 2 Phill. 15; *Saunders v. Saunders*, 1 Roberts. 562; *Waddell v. Waddell*, 2 S. & T. 584.

² Dr. Lushington has observed of this act: "So gross a personal insult would be insufferable even in the lowest grades of life. How much more criminal, how much more painful to the feelings of the injured wife when such an offence takes place between those who have been accustomed to the decencies of society, and have been educated to enter-

Another test of injuries of this kind is the sense in which they are received. "If," said the Judge of the Consistory Court, in *Westmeath v. Westmeath*,³ "they are not resented as injuries at the time, a state of things intervenes which either detracts from the weight of the particular evidence when brought forward at a subsequent period, or may introduce quite another view of the relative situation of the parties."

An instance of as gross an indignity as spitting in the face occurred where a husband assaulted his wife in a public street, and though he did her no personal injury, yet by his filthy language and conduct, he led a passer-by to take her for a common prostitute and insult her: it was held to be a case of gross and abominable cruelty.⁴

tain a high regard for them. . . . Is it possible to imagine that when a husband has proved himself so utterly insensible to all those feelings which he ought to entertain towards his wife, so brutal, so unmanly, that he would, when his passion was excited, restrain himself within the bounds of the law, and that his wife would be safe under his control? Threats of personal ill-usage have been deemed sufficient to justify a separation. I am of opinion that such an outrage as this is more than equivalent to any threat, for it proves a malignity of feeling which would require only an opportunity to show itself in acts involving greater personal danger, but never surpassing in cowardly baseness. Nor are such consequences less to be feared, when it is proved, as here it is, that the husband supposed, though vainly so, that he was not within the cognizance of the law, for those who are resolved to go to the verge of the law are the most likely to overstep those bounds which their fear only and not their sense of duty prescribes to them." *Saunders v. Saunders*, ut supra.

³ 2 Hagg. suppt. 52.

⁴ *Milner v. Milner*, 4 S. & T. 240.

Cruelty by the husband towards his children in the presence of the mother, has been held to be cruelty to her,⁵ but this must depend much upon the *animus*. In *Wallscourt v. Wallscourt*,⁶ Dr. Lushington said: "Where the gist of the charge is *quo animo* the conduct was pursued, it becomes necessary to examine with great minuteness not only the facts themselves, but in the case of severity shown by a father towards a child in the presence of its mother—which is not necessarily cruelty towards the mother, though, under some circumstances, it may amount to cruelty—whether it was an intentional act of cruelty or not; for a father might be guilty of the greatest cruelty towards his child individually, and yet it might not be possible to allege that it was cruelty towards the mother; whereas, on the other hand, a father might be guilty of a less degree of cruelty to his child with the intention of inflicting cruelty upon the mother."

There is, however, a species of cruelty almost worse than physical violence, consisting of the constant repetition of insulting and degrading language and conduct, which in the end—for

"'Tis the vile daily drop on drop which wears
The soul out (like the stone) with petty cares"—

breaks down the health of both mind and body and renders life almost unbearable.⁷ Under such

⁵ *Bramwell v. Bramwell*, 3 Hagg. p. 637; *Suggate v. Suggate*, 1 S. & T. 491.

⁶ 5 N. of C. p. 132.

⁷ This view of legal cruelty was shadowed forth by Lord

circumstances, the Court will put a liberal construction on the terms "danger of health," and grant relief to the suffering party ; as in *Kelly v. Kelly*,⁸ the distinguishing peculiarity of which case was the adoption by the husband, a clergyman, of a deliberate system of conduct towards his wife with the view of bending her to his authority, and in the course of which, she was purposely subjected to the treatment stated below.⁹

Brougham in *Paterson v. Russell*, 7 Bell's Appeal Cases, 337, where in giving judgment, he said: "If the husband without any violence or threat of violence to the wife, without any maltreatment endangering life or health, or leading to an apprehension of danger to life or health, were to exercise mere tyranny, constant insult, vituperation, scornful language, charges of gross offences utterly groundless ; charges of this kind made before her family, her children, her relations, her friends, her servants ; insulting her in the face of the world and of her own domestics, calling upon them to join in those insults, and to treat her with contumely and with scorn ; if such a case were to be made out, or even short of such a case, any injurious treatment which would make the marriage state impossible to be endured, rendering life itself almost unbearable, then I think the probability is very high that the Consistory Courts of this country would so far relax the rigour of their negative rule at present somewhat vague, as to extend the remedy of a divorce *a mensâ et toro* to a case such as I have put."

⁸ L. R. 2 P. & D. 31 (Dec. 7, 1869).

⁹ "She was entirely deposed from her natural position as mistress of her husband's house ; she was debarred the use of money entirely ; not only were the household expenses withdrawn from her control, but she was not permitted to disburse anything for her own necessary expenses ; every article of dress, every trifle that she required had to be put down on paper, and her husband provided it if he thought

The main cause of this treatment was that some correspondence, which had passed between the petitioner and her brother-in-law and brother respecting the investment by her husband of a sum of money which had been bequeathed to her, fell into Mr. Kelly's hands, from which he took up the idea which he afterwards allowed to fill his whole mind, that his wife was plotting and conspiring against him. The respondent did not deny or even

proper. Having refused on one occasion of going into the town, to tell her husband everywhere that she had been, an interdict was placed on her going out at will. At one time the doors were locked to keep her in; at another a man-servant was deputed to follow her; at another the respondent insisted on accompanying her himself whenever she wished to go abroad. On these occasions he appears to have occupied the short time they were together in what he called putting her sin before her in strong, coarse, and abusive terms, applying to her the same epithets and language as would be applicable to a woman who had been guilty of adultery. He took no meals with her; he occupied a separate bedroom; he passed no portion of the day, however small, in her society. They met only at family prayers, and if he spoke to her at all it was only to give some directions, or to reproach her. Save on one or two occasions she saw no one. Those whom she desired to see were forbidden the house. She was absolutely prohibited from writing any letters, unless her husband saw them before they were posted. She was thus, as far as the respondent could achieve it, practically isolated from her friends. Meanwhile, the care of the household was confided to a woman hired for the purpose, who was directed not to obey Mrs. Kelly's orders without the respondent's directions. In short, she was treated like a child or a lunatic, and in this light she was actually regarded by the woman just mentioned, when she first entered the service, and this, be it remembered, though she had passed the mature age of sixty years, and had been married to the respondent for seven-

qualify the evidence of the petitioner as to her state of health, but endeavoured to justify his conduct.

Judgment. In the result, the Court held that force, whether physical or moral, if systematically exerted to compel the submission of the wife, in such a manner, to such a degree, and during such a length of time as to break down her health, and render a serious malady imminent, though there be no actual physical violence, is legal cruelty, and in conclusion observed that "the law leaves the husband, by his own conduct and bearing, to secure and retain in his wife the only submission worth having, that which is willingly and cheerfully rendered. And if he fail, this Court cannot recognize his failure as a justification for a system of treatment by which he places his wife's permanent health in jeopardy, and sets at nought not only his own obligations in

and-twenty years. With no occupation, debarred the society of her husband and son at home and that of her friends abroad, withheld from the performance of her household duties, subordinated to servants, penniless, and, so far as her husband could effect it, friendless, the daily life of this lady was little better than an imprisonment, the solitary silence of which was broken only by the language of harsh rebuke, foul words, and epithets of insult, indignity, and shame. What wonder that under so grievous an oppression her health at length gave way? She could not eat, she hardly slept at all, she was subject to constant trembling and fainting, she awoke involuntarily screaming at night, and her nervous system was so shattered that the medical witnesses declared paralysis or even madness to be imminent." From the judgment of Lord Penzance, L. R. 2 P. & D. pp. 34, 35.

matrimony but the very ends of matrimony itself, by rendering impossible the offices of domestic intercourse and the mutual duties of married life."

On appeal to the Full Court, this decision, decreeing a judicial separation, was affirmed, and the Judge Ordinary then added the following observations: "In determining whether a case is made out for the interposition of the Court, reliance is not to be placed on any one feature of the case to the exclusion of the rest. It is not to be said from anything which the Court has here decided that this or that is denied to the husband or permitted to the wife. The health and safety of the wife is no doubt the leading consideration. Still, it is necessary that due regard should be had not only to the degree in which that safety or health appears to have been compromised or placed in jeopardy, but to the clearness with which this fact is established in evidence. So again, it is necessary that the acts of the husband by which the wife's health or safety is said to have been thus threatened should not only be proved and the alleged consequences plainly deduced from them, but their motives examined and their causes considered. And finally, the conduct of the wife herself by way of provocation must not only be taken into the account, but her demeanour under even unmerited oppression or unprovoked cruelty must be studied by the Court. It is upon the sum of these considerations that the Court can alone decide whether a case is made for a decree."¹

Further
observa-
tions of
Lord
Penzance.

¹ L. R. 2 P. & D. pp. 75, 76.

Husband
may not
be the
only one
to blame.

Although suits on the ground of cruelty are usually brought by the wife as the more infirm party, it does not necessarily follow that the husband is to blame, or is the only one to blame; for it may have been the fault of both or of the complaining party herself alone; and the decisions have imported this further proposition as a condition of the Court's interference—that the troubles of the wife are not owing to her own misconduct. If a wife can insure her own safety by lawful obedience and a proper self-command, she has no right to come to the Court, for It only affords its aid where the necessity for its interference is absolutely proved. On the other hand, it is not necessary that the conduct of the wife should be entirely without blame, nor does she lose her title to the protection of the Court merely because she has proved unable to bear with perfect patience and unflinching propriety of conduct the ill-usage of her husband. She is clearly justified in not submitting without remonstrance to wanton tyranny or the unreasonable infliction of discomforts and privations injurious to her health.

Violence
or provo-
cation by
the wife.

But if she goes beyond this, and provokes violence by violence, the case bears a very different aspect. In *Waring v. Waring*,² Lord Stowell

² 2 Consist. 153. In considering the evidence, p. 165, the Judge described with classic humour the successful issue of one of Mrs. Waring's contests with her husband, in which she carried off his wig; "the *opima spolia* of this not *incruenta victoria*: he following her in vain, asking for, and attempting to recover his wig which had been pinned up in the window curtains of

said: "When the wife is the complainant, presumptions of injury may be derived from the comparative weakness of her constitution: it is not however impossible that she may have been the aggressor, and by provocations have brought upon herself the ill-treatment complained of: when that appears, she is not entitled to relief from the Court: it is the consequence of her own conduct, and she has the remedy in her own hands by an alteration of her conduct; and if the law was not backward in its interference in such a case, it would furnish the wife with a very short course to a sentence of separation if she wished it, for she would have nothing to do but to provoke ill-treatment by ill-behaviour. I do not mean by this, that every slight failure of duty on the part of the wife is to be visited by intemperate violence on the part of the husband. The correction of such failings must be softened by a due recollection of human infirmity, and of the tender relation subsisting between such parties; and there may be cases of that kind provoked by the wife, but unduly visited by the husband, in which the Court would not decline to interfere. But if the conduct of the wife is inconsistent with the duties of that character, and provokes the just indignation of the husband, and causes danger to her person, she must seek the remedy for that evil, so provoked, in the change of her own manners. . . . That which is violent, if aggressive, may be justified or excused if defensive; and, if the wife gave the first blow—

the drawing-room, and not discovered and *recaptured* till the next day."

though to return it may not be manly—the law will allow for human infirmity under such gross and scandalous indignity. . . . To entertain personal scuffles with a woman and a wife is a cruel necessity; but a man may protect and defend his own life and liberty. It is a difficult task to return blows, let them come from whom they may, with words only.”

So in *Best v. Best*,³ the Court said: “No wife can solicit the interference of the Court to protect her even from ill-treatment which she has drawn upon her by her own misconduct; she must first, at least, seek a remedy in the reform of her own manners.⁴ If, however, it should appear that even misconduct on the wife’s part has produced a return from the husband wholly unjustified by the provocation, and quite out of proportion to the offence, it might still be the duty of the Court to interfere judicially, notwithstanding such, the wife’s, positive misconduct.”

Wife’s
cruelty.

The foregoing observations comprise almost all that can be said upon those cases in which the wife, though legally the complainant, is morally the

³ 1 Add. p. 423: the wife looked merely to her husband’s fortune and endeavoured to extort a settlement by practising every species of annoyance upon him; absenting herself from his house repeatedly against his will; and by rendering his habitation during her presence in it a constant scene, not merely of verbal altercation but actual personal conflict. p. 417.

⁴ In *Taylor v. Taylor*, 2 Lee, 172, the wife was held not entitled to a divorce by reason of cruelty, as it appeared that she was a person of bad temper, and had not behaved well and dutifully to her husband.

delinquent, and naturally lead to the consideration of suits by the husband on account of the wife's cruelty, which, though happily rare, have been occasionally brought, and with success. For the husband is not the less entitled to be protected from violence, where the wife's passions from whatever cause, whether from the effects of jealousy, or from intemperance,⁵ are so entirely beyond her control that she is in the habit of assaulting him so as to place him in danger of bodily injury, though no serious injury may have been inflicted.⁶

Suit by the husband.

Again to cite the language of Lord Stowell:—
 “Words of menace, if accompanied with probability of bodily violence, will be sufficient. It may be enough if they are such as inflict indignity and threaten pain: it will be the duty of the Court to say that the suffering party is not obliged to continue in cohabitation under such treatment.” And with respect to violence caused by jealousy:—
 “Jealousy is a passion producing effects as violent as any other passion, and there will be the same necessity to provide for the safety and comfort of the individual.⁷ If that safety is endangered by

⁵ But the drunken violence of the wife will only justify the use of such force on the part of the husband as may be necessary to restrain her; he has no right to retaliate and beat her. *Pearman v. Pearman & Burgess*, 1 S. & T. 601.

⁶ *White v. White*, 1 S. & T. 591.

⁷ Moreover, wives who indulge themselves in violence towards their husbands from well or ill-founded jealousy, would do well to remember that beating an erring husband, locking him up in his own house, or locking him out of it, are not the likeliest means to reclaim his wandering affections;

violent and disorderly affections of the mind, it is the same in its effects as if it proceeded from mere malignity alone : it cannot be necessary that in order to obtain the protection of the Court, it should be made to appear to proceed from malignity.”⁸

Distinction
between
suits by
husband
and by
wife.

Dr. Lushington, while admitting that the same principles of cruelty would be applicable to suits by the husband as by the wife, was of opinion that “there must be some distinctions, necessarily founded on the great difference between the sexes, and the power of the husband in ordinary circumstances to protect himself from his wife’s violence.”⁹ But the position of the husband as petitioner on the ground of cruelty was well considered in the case of *Prichard v. Prichard*,¹ where the Judge Ordinary said: “Violence by the husband and similar conduct in the wife hardly deserves to be considered in the same identical light. Repeated bodily injury inflicted by the stronger party portends little safety to the weaker. There is nothing to restrain a man in such encounters but himself. Where the woman is the assailant, it is otherwise, and many a man may submit to the outrage of a blow, who would defend himself from real injury

but that such conduct will most probably lead to the very opposite result, and drive the object of such treatment to the comforts of some more indulgent society.

⁸ *Kirkman v. Kirkman*, 1 Consist. 409. In this case, however, the wife was in the habit of violently assaulting her husband, scratching and tearing his face with her nails, besides insulting him with the most foul and opprobrious language.

² *Furlonger v. Furlonger*, 5 N. of C. p. 425.

¹ 3 S. & T. p. 525.

if imminent. But if the physical effects of violence by the wife are less, the moral results are immeasurably greater. How is it possible that submission, which is the wife's lot in marriage can be maintained by the husband if she become his assailant? The mutually dependent duties of the marriage state suffer a hopeless confusion in such an inversion of parts. Indignity and loss of self-respect undermine the position of the husband, and release the wife from all moral control. Cohabitation on the terms of the marriage contract ceases to be longer possible. But worse than all, the man is incited to the retaliation of force, perhaps driven to violence in self defence. And if holding its hand this Court refuse to relieve him from the perils of provocation, what security is there for the safety of the wife herself?"²

² Again, in *Forth v. Forth*, 36 L. J. 122, "The ground on which the Court interferes in such cases is different from that on which it proceeds when the wife is the petitioner. The fact that the husband can defend himself is the very grievance. It is because he may be tempted in defending himself to retaliate on his wife that the Court is bound to interfere, and to decree a judicial separation when such acts are proved. When a man marries an ill-tempered woman, he must put up with her ill-humour; but the moment she lifts her hand against him, the Court must interfere, for if it does not, how can it answer the husband if he should subsequently allege that he had been forced to use violence in self defence?"

In this case, a judicial separation was decreed, though the parties had continued to live in the same house until the hearing of the cause; as it appeared that the husband, who held a public appointment from which he derived only a small

DESERTION—TO BE CONSTRUED BY THE INTENT—
DEEDS OF SEPARATION—CASES ILLUSTRATING
DESERTION.

The next ground of relief to be considered is: "adultery coupled with desertion without reasonable excuse for two years or upwards" as founding the wife's suit for dissolution of marriage; or, "desertion without cause for two years and upwards"³ as a ground for judicial separation at the suit of either husband or wife.⁴

income, was unable to have a separate home for his wife: he could neither turn her out, nor go elsewhere himself.

³ See ante, p. 60, note 3.

⁴ The fact of desertion must be distinctly averred in the petition. See Form, No. 1 in Appendix. The date of the alleged desertion must be stated, in order that the period prescribed by the statute may be clearly shown to have elapsed before the date of filing the petition.

An answer to a petition on the ground of desertion may set out facts showing that there was reasonable ground for the desertion, but such facts should be stated succinctly. *Hill v. Hill*, 33 L. J. 187. What will constitute 'reasonable excuse' or 'cause,' short of a matrimonial offence, has not been determined. See post. Chap. III, under the head of 'desertion' as a discretionary bar.

When the answer to a petition alleging desertion merely traverses the charge, evidence is not in strictness admissible of an offer to return subsequently to the alleged desertion, nor is evidence admissible of facts showing the insincerity of such offer to return. The offer to return should be pleaded in the answer, and the facts relied upon to show its insincerity should be pleaded in a replication.

In *Mallinson v. Mallinson*, L. R. 1 P. & D. 93, the respon-

Legal "desertion," within the terms of the Divorce Act, has not yet been, nor is it desirable that it should be strictly defined. To desert is to forsake or abandon so as to break off more or less completely the intercourse which previously existed, and as the degree of intercourse which married persons are able to maintain with each other is various, the facts which constitute "desertion" must vary with the circumstances and mode of life of the parties.

"To some it is given to meet only at intervals, though of frequent recurrence. It is the lot of others to be separated for years, or to meet only under great restrictions. The fetters imposed by the professions of the Army and Navy, the requirements of commercial enterprise, and the call to foreign lands which so frequently attends all branches of industrious life, make these restrictions often inevitable. But perhaps on no class do they fall so heavily as on those who devote themselves to domestic service for the means of life. And yet matrimony is made for all; and matrimonial intercourse must accommodate itself to the weightier considerations of material life. . . . So long however as the husband treats his wife as a wife by

dent was called to prove that he had made the petitioner an offer to return to cohabitation before her right to petition for judicial separation on the ground of his desertion had accrued; and the Court allowed questions to be put to him in cross-examination tending to show that at the time the alleged offer was made, he was adulterously cohabiting with another woman.

maintaining such degree and manner of intercourse with her as might naturally be expected from a husband of his calling and means, he cannot be said to have deserted her.”⁵

To be
construed
by the
intent.

Desertion is to be construed by the *intent*, either at the time when the separation takes place, or subsequently, and such intent must be gathered from the conduct, language or letters of the parties; as in the case of *Lawrence v. Lawrence*,⁶ where the marriage took place in 1851, and the cohabitation continued till 1856, when the husband went to China, holding an office in the commissariat. The wife and the only child of the marriage remained in England. By letters written by the husband to his wife between February and December, 1859, it appeared that he had led a most extravagant life in China, and had been found guilty of embezzling moneys; that the wife and her family had treated him liberally in respect of money, and in the course

⁵ *Williams v. Williams*, 3 S. & T. 547, where the husband and wife being in domestic service, but in separate situations, were able to meet only from time to time; and the Court held that the husband's refusal to embark in business—at the wife's request—in which he had before failed, could not be referred to a determination not to cohabit with her.

⁶ 2 S. & T. 575; 31 L. J. 145.

In *Meara v. Meara*, 35 L. J. 33, the husband had left his wife with an expressed intention not to renew cohabitation with her, never afterwards made her an offer of a home, and only went to see her occasionally for the purpose of obtaining her money: casual expressions in her letters to him, in which she recapitulated his misconduct towards her, such as—“under these circumstances I do not wish to see you again,” &c. were held not to imply consent to his remaining apart from her.

of 1859 had provided him with considerable sums on his representation of amendment and intention of going to Australia. In these letters he expressed affection for his wife and child, but no desire to join them, or be joined by them. He came through Paris to London instead of going to Australia, and on the 10th December, 1859, wrote to his wife that he had spent all his money, and incurred divers liabilities by borrowing and otherwise. He addressed a few lines to her on the 13th December, 1859, which were the last he wrote, but made no attempt to see her. In November, 1859, he made the acquaintance of the woman with whom the adultery was proved, and in a letter to her dated the 12th August, 1860, wrote:—"I was forced into a marriage some years ago with one who is very rich, and for whom I had no love. . . . I was miserable in my home, and took a staff appointment abroad about three years ago. I have not seen my wife for more than three years."

The wife, by her petition, dated 7th November, 1861, prayed for a dissolution of marriage, and the question was whether, looking at the dates as set out above, there had been desertion for two years before the date of the petition. The Court, construing the husband's letters by his acts rather than their words, came to the conclusion that probably, from the time when he left England, he never *intended* to return to his wife, and that his conduct amounted to desertion.

I have set out the leading facts of this case, because it is a good illustration of the manner in which a separation, harmless in the first instance,

may, by circumstances, be converted into desertion.

Must be
against the
will of the
wife.

—Generally, however, the separation must have been, from the beginning, against the will of the wife, and must have continued without her consent;⁷ for if it has been the result of mutual agreement, or has taken place by virtue of a deed of separation—unless such deed has never been acted upon⁸—there can be no desertion.

In *Nott v. Nott*,⁹ the husband having deserted his wife, wrote to her, asking for assistance to save him from starving, but he refused to return to her, or to allow her to come to him. She consented to make him an allowance, and in a few months after the desertion, they both signed a deed of separation, whereby the payment of the allowance was secured

⁷ *Ward v. Ward*, 1 S. & T. 185, where the husband had been bound over before a police magistrate to keep the peace towards his wife, after which he left her, and lived with another woman: it did not appear clearly that the separation was against the wife's wish, and the decree passed on the grounds of adultery and cruelty. *Smith v. Smith*, 1 S. & T. 359, where the husband was a man of vile habits and bad temper; and after he had left his wife, she went to live with her sister, and there was no proof that he knew where she was living.

⁸ *Cock v. Cock*, 3 S. & T. 514. In this case, the parties continued to cohabit for some months after the deed was executed, and though the husband had covenanted not to interfere with his wife, but to allow her to live separate and apart from him, she had never availed herself of that permission. On the contrary, when he actually left her it was against her strongly expressed wish. Moreover, the deed contained certain pecuniary provisions which were never acted upon, and a clause making it, under those circumstances, void.

⁹ L. R. 1 P. & D. 251.

to him: the deed was not carried into effect, but she paid the allowance to him for three months, and then stopped it, because she thought that by continuing the payment, she was encouraging him to keep apart from her. She afterwards wrote, and asked him to resume cohabitation, but he refused. More than two years having elapsed since the beginning of the desertion, she filed a petition; and it was held that as she never consented to his remaining apart from her, the desertion was established.

A husband cannot be said to have been guilty of desertion if he has absented himself from the necessity of his circumstances, or for the purpose of seeking employment, provided that he has done so with the intention of renewing cohabitation;¹

Necessary
absence
not
desertion.

¹ *Thompson v. Thompson*, 1 S. & T. 231, where the husband having failed in business in Leeds, went to London in search of employment, leaving his wife at her father's house. During some months, he wrote her several letters which she did not answer. At last he wrote saying that if she did not answer, he must suppose that she no longer wished to be on any terms with him. The Court held that his absence was in the first instance necessary to seek employment, and that, looking at the conduct of the wife, the continuance of that absence could not be considered as desertion.

In *Oudlipp v. Oudlipp*, 1 S. & T. 229, the husband being in embarrassed circumstances left his home in 1843, and did not answer letters from his wife telling him that there was an execution in the house. She subsequently supported herself as a governess. In 1844, he made by letter a vague offer of rejoining her, and in 1848 wrote, bidding her farewell for ever. It was held that he had wilfully deserted her in 1843-4, and had never afterwards made a distinct offer of a home.

but he may "desert" his wife, though he may continue to keep up some communication with her, or even to provide her with the means of support; for the wife has a right to the comfort of her husband's society, the security of his home and name, and the protection of his presence, so far as his position and avocations will admit, and he cannot turn round and say that he has not deserted her merely because he has made her an allowance.²

Neglect
and
infidelity.

On the other hand, to neglect opportunities of consorting with a wife is not necessarily to desert her. Indifference, want of proper solicitude, illiberality, denial of reasonable means, and even faithlessness, are not desertion: the fact that a man is living with another woman does not necessarily prove that he has deserted his wife; unless, of course, his connexion with her be such as to have withdrawn him entirely from his wife's society—in such a case, the desertion may be dated from the time when the husband made up his mind to abandon his wife, and cohabit with another woman.³

In fine; desertion is constituted, not by mere separation, but by the wilful breaking off of matrimonial intercourse by the one party against the will of the other, with the intention of not renewing it.

² *Macdonald v. Macdonald*, 4 S. & T. 242; *Yeatman v. Yeatman*, L. R. 1 P. & D. 489.

³ *Ward v. Ward*, 1 S. & T. 185; *Williams v. Williams*, 3 S. & T. p. 548; *Gatehouse v. Gatehouse*, L. R. 1 P. & D. 331.

The husband may effect his object by adopting such a course of conduct as to render cohabitation unbearable, and thus drive his wife from his society; and upon any proposal to return, she may stipulate for an alteration in his conduct as a condition precedent to a renewal of cohabitation: if he then refuse to amend his ways, his conduct taken altogether may amount to desertion; for she is not bound to go back to him if—for instance—he is carrying on an adulterous intercourse, which would be ground for a separation.

Desertion
effected by
misconduct.

In *Graves v. Graves*,⁴ the husband, by his insulting conduct to his wife, compelled her to leave his house: he made no attempt to get her back. About a month afterwards, she tried to induce him to receive her as his wife: he refused, and she received a letter from him to the effect that he did not wish to see or hear anything more of her, and that she might consider the separation which had taken place as final. Afterwards, on a proposal by a common friend of the parties to bring them together, she learnt, for the first time, that he had been carrying on an adulterous intercourse, but expressed her willingness to return if that connexion was broken off. Upon the wife's suit for dissolution, the Court held that the husband had evidently determined not to live with his wife, and that his conduct amounted to adultery, coupled with desertion.⁵

⁴ 3 S. & T. 350; 33 L. J. 66.

⁵ In *Gibson v. Gibson*, 29 L. J. 25, the husband left his wife in 1851, and never afterwards lived with her, or contri-

The following notes of cases in which desertion was *not* established will further illustrate the propositions above laid down.

Deed of
separation.

In *Crabb v. Crabb*,⁶ the parties separated, and immediately afterwards executed a deed of separation containing covenants on the part of the husband to allow the wife £100 a year for the maintenance of herself and their infant son until he attained the age of fifteen, and also giving her the sole custody of the child up to that age. The husband paid the allowance only for the first two quarters, and then went to India, and afterwards declined to pay it. On the hearing of the wife's petition on the grounds of adultery and desertion, it was held that the execution of the deed by the wife was inconsistent with the charge of desertion; for even assuming that the covenant giving the wife the sole custody of the child would make the deed void in equity, and notwithstanding the failure on the part of the husband to perform his part of the contract, the separation was in the first instance voluntary, and being an act done under the deed, it could not be treated as if the deed had never existed.⁷

buted to her support, but at an interview in 1854, the wife offered to renew cohabitation if he would give up gambling and drinking, but he refused: it was held that though the wife had annexed a condition to a renewal of cohabitation, the husband's refusal to abandon his bad habits amounted to desertion.

⁶ L. R. 1 P. & D. 601.

⁷ "But," said the Judge Ordinary in the above case, "if a man determining to abandon his wife, were to set about

In *Keech v. Keech*,⁸ the parties were living together in Jamaica, where the husband held an appointment: the wife was obliged to come to England in consequence of illness. The husband afterwards, in 1851, asked her to return to him, and provided funds for her passage, but her health not being sufficiently re-established, she did not accept his offer. She had no further communication with him, but in 1856, he made her an allowance, which he continued to pay until 1860. It was held that as she had never made any offer to return to him after refusing his request in 1851, he had not deserted her.

No offer
to renew
cohabitation.

In *Fitzgerald v. Fitzgerald*,⁹ the wife had instituted a suit on the grounds of adultery and cruelty in which she failed. The parties never afterwards resumed cohabitation, and neither of them took any step for the purpose of bringing about a reconciliation. In a second suit by the wife on the grounds of adultery and desertion, the Judge Ordinary, in dismissing the petition, held that the husband's conduct in holding aloof from the wife, and in making no demand of cohabitation, did not constitute desertion; and with respect to cases

fraudulently, by the show of an agreement which he intended never to fulfil, to induce or extort her consent to their mutual separation, covering his true purpose under delusive covenants, and seeking a shield for his design in a consent bought by treachery, the Court might well be asked to reject the false face of the transaction, and regard the real object that lay underneath."

⁸ L. R. 1 P. & D. 611.

⁹ L. R. 1 P. & D. 694.

where a separation, however brought about, has been tacitly acquiesced in, observed :—" No one can 'desert' who does not actively and wilfully bring to an end an existing state of cohabitation. Cohabitation may be put an end to by other acts besides that of actually quitting the common home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully, against the wish of the other party, and in execution of a design to cease cohabitation, would constitute desertion. But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion' in my judgment becomes from that moment impossible to either, at least until their common life and home have been resumed. In the meantime, either party may have the right to call upon the other to resume their conjugal relations, and, if refused, to enforce their resumption; but such refusal cannot constitute the offence intended by the statute under the name of 'desertion without cause.'"

In *Buckmaster v. Buckmaster*,¹ the husband having refused to cohabit with his wife, or to provide a home for her, offered her £100 on condition that she would not molest him in future by insisting on her right to live with him. She agreed to the condition, received the money, and they never afterwards cohabited. It was held that as the

¹ L. R. 1 P. & D. 713.

wife chose to bargain that they should not live together, there could be no desertion.

Again, in *Parkinson v. Parkinson*,² the husband having left his wife, and cohabited with another woman ; a deed of separation was, through the interposition of a common friend, entered into, by which the husband covenanted to make his wife an allowance, to be charged upon his reversionary interest in a sum of £5000, and she agreed to live separate and apart from him. The deed was duly executed by the husband and wife, and by a trustee on behalf of the wife ; but the husband never paid any part of the allowance, and never contributed to her maintenance. On the hearing of her petition for dissolution of marriage on account of his adultery and desertion, it was held that the wife had bargained away her right to relief on the ground of desertion, but that she was entitled, if she chose to apply for it, to a judicial separation on the ground of adultery.³

When the wife's right to sue on the ground of desertion has once accrued, such right cannot be barred by a subsequent offer on the part of her husband to return and cohabit with her, provided

Right to
sue having
accrued not
barred by
offer to
return.

² L. R. 2 P. & D. 25.

³ Subsequently, the Court allowed her to amend her petition by adding a charge of cruelty ; being satisfied from the affidavits made by her that until the hearing, she was ignorant that the acts she could prove against her husband amounted to legal cruelty. She had soon after her marriage suffered from syphilis, of the nature of which she was then ignorant, and that the communication of such a disease by her husband was legal cruelty. L. R. 2 P. & D. 27.

that the necessary period of desertion—two years—be complete before such offer is made; nor is it necessary that the desertion should continue to the time of filing the petition, where the husband has been guilty of adultery as well as desertion, for he thereby creates a bar to his wife's return, and she would, by accepting his offer to renew cohabitation, condone the adultery, which she is under no obligation to do.⁴

⁴ *Cargill v. Cargill*, 1 S. & T. 235; *Basing v. Basing*, 3 S. & T. 516; 33 L. J. 150.

CHAPTER III.

Defences in Suits for Dissolution of Marriage and for Judicial Separation—Statutable Provisions—Intervention by the Queen's Proctor—Absolute Bars: Connivance; Condonation; Collusion—Discretionary Bars: Petitioner's Adultery; Unreasonable Delay; Cruelty; Desertion or Wilful Separation; Wilful Neglect or Misconduct conducing to Adultery—29 Vict. c. 32. s. 2—Wife's Costs after Suit.

BEFORE entering in detail upon the defences in suits for dissolution of marriage,¹ I will state the rules and provisions to be observed by the Court in such suits. By the 29th section of the Diverce Act, it is the duty of the Court to satisfy itself so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same, and also to inquire into any countercharge which may be made against the petitioner; and by the 30th section: In case the Court on the evidence in relation to any such petition shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the

Rules and
provisions
of the
Diverce
Act.

Dismissal
of petition.

¹ And which, though not so provided by the statute, are in some respects equally applicable to suits for judicial separation.

adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases, the Court shall dismiss the said petition.

These being the cases in which the petition is to be dismissed, the 31st section describes cases in which a decree of dissolution is to be pronounced.

Cases in which decree to be made.

In case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved.

But the obligation thus imposed is modified by a proviso which takes certain cases out of the category of the obligation created by the former part of the section.

Proviso.

The proviso is: that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall in the opinion of the Court have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.

Beyond a mere denial then,² which in effect only enables the respondent or co-respondent to put in issue at the hearing of the cause, the credibility of the evidence adduced in support of the petition—the charges or defences which under the above sections may be set up in answer to a petition for dissolution of marriage—or may be found by the Court upon the hearing—may be divided into absolute and discretionary bars: absolute being, Connivance; Condonation; Collusion;³ either of which, if proved to the satisfaction of the Court, constitutes an absolute bar to the relief sought by the petitioner: discretionary being, Adultery; Unreasonable delay; Cruelty; Desertion or Wilful separation; Wilful neglect or misconduct conducing to the adultery; either of which, though proved, leaves the Court a discretion, according to the circumstances to grant or withhold its decree.⁴

As the Court had not always the means of discovering collusion, and it was quite possible that a

Intervention by the Queen's Proctor.

² If the fact or the legality of the marriage itself be denied in the answer, the validity of the marriage is then the first question to be decided.

³ Collusion is from its nature more especially the subject of discovery by the Court, or of intervention by the Queen's Proctor.

⁴ With regard to the discretionary power of the Court under the above proviso; it has been held that when the allegations in the petition have been established, a case for the exercise of the discretion of the Court does not arise unless there is affirmative evidence of one of the discretionary bars above enumerated. *Haswell v. Haswell & Sanderson*, 1 S. & T. 502.

dissolution of marriage might be obtained where each party knew the other to be equally guilty: in order in some degree to meet such cases, it was enacted by 23 & 24 Vict. c. 144, s. 7, that at any time during the progress of the cause, or before the decree is made absolute,⁵ any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney General may deem necessary or expedient; and if from any such information or otherwise the said Proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may under the direction of the Attorney General, and by leave of the Court, intervene in the suit,⁶ alleging such case of collusion, and retain counsel and subpoena witnesses to prove it; and it shall be lawful for the Court to order the costs of such counsel and witnesses, and otherwise arising from such intervention, to be paid by the parties or such of them as it shall see fit,⁷ including a wife if she have separate property; and in case the said

⁵ As to decrees *nisi* and absolute, and intervention—or as it has been properly termed, interference—by third persons, see ante, pp. 22, 23.

⁶ See Rules 68, 69 in Appendix.

⁷ It has been decided—*Lautour v. The Queen's Proctor*, 10 H. of L. cas. 685—that costs cannot be given to the Queen's Proctor except when he proves collusion; and that costs cannot be given against him when he intervenes unsuccessfully. *Wilson v. Wilson*, the Queen's Proctor intervening. L. R. 1 P. & D. 180.

Proctor shall not thereby be fully satisfied his reasonable costs, he shall be entitled to charge and be reimbursed the difference as part of the expense of his office.

Under the above section, the Queen's Proctor ^{When he may intervene.} may intervene at any stage of a suit for dissolution of marriage, or before the decree is made absolute;⁸ and may allege not only actual collusion, but also any countercharge against the petitioner which may be brought to his knowledge, and which may operate as an absolute, or as a discretionary bar to the suit.⁹ The result of such intervention is that the Court is to deal with the case by making the decree absolute or by reversing the decree *nisi*, or by requiring further inquiry or otherwise as justice may require.¹ When the Queen's Proctor intervenes after a decree *nisi*, and proves his charge against the petitioner, the Court usually reverses the decree and dismisses the petition; and when damages have been awarded, such reversal may

⁸ In most cases, however, it is not until after the decree *nisi* that he obtains the information requisite to enable him to intervene: his intervention is sometimes brought about by facts disclosed at the hearing of the cause being laid before him by the Court.

⁹ *Drummond v. Drummond*, 2 S. & T. 269; *Latour v. Latour & Weston*, 2 S. & T. 524; *Gray v. Gray*, 2 S. & T. 554; *Marris v. Marris & Burke*, 2 S. & T. 530; *Boulton v. Boulton & Page*, 2 S. & T. 638.

In *Dering v. Dering & Blakeley*, the Queen's Proctor and others intervening, L. R. 1 P. & D. 531, it was held that the Queen's Proctor may bring collusion and all other matters before the Court in one plea.

¹ 23 & 24 Vict. c. 144, s. 7.

include the verdict of the jury in that respect;² for as will be seen hereafter, the petitioner has no legal right to the damages even when recovered, but the Court has power to deal with them as It may think fit.³

I now proceed to explain these bars or defences in the order in which I have stated them; and to avoid repetition, shall notice the Queen's Proctor's intervention as it arises under each head.

ABSOLUTE BARS.

Conni-
vance.

To connive is to wink; to pretend blindness or ignorance: connivance therefore implies knowledge of, and acquiescence in the adultery charged: as a legal doctrine, it has its source and its limits in the principle, *volenti non fit injuria*.⁴ no wrong can be said to have been done to a spouse who has given a

² In *Ravenscroft v. Ravenscroft & Smith*, the petitioner had obtained a verdict with damages, and a decree *nisi* had been pronounced with costs; but the Queen's Proctor intervened, and proved gross adultery on the part of the petitioner. The Court reversed the decree including the order against the co-respondent to pay costs and the finding of the jury as to damages. Feb. 20, 1872.

³ Chap. VI. Settlement of damages.

⁴ This doctrine, varied only in expression according to the circumstances, has been laid down in a series of cases which were first collected in *Rogers v. Rogers*, 3 Hagg. 57, and again in *Phillips v. Phillips*, 1 Roberts. 144; 3 N. of C. 444; on appeal to the Arches Court, 4 N. of C. 523; and on appeal to the Privy Council, 5 N. of C. 435.

This last may be considered a leading case, as it was twice the subject of appeal, and the previous decisions and the facts were very fully discussed.

willing consent, though without being an accessory before the fact,⁵ to the adultery of the other party.

To be "accessory" means not only being willing and consenting to; but the taking some active steps in promoting the criminal intercourse.

It is not necessary however that any active steps should be taken to induce or encourage the criminality: passive acquiescence with an intention that adultery should be committed is as much a bar as active conspiracy. But there must be—if not corrupt encouragement—at least a consenting, willing mind: there must be something more than mere negligence, mere inattention; than over confidence, dulness of apprehension, mere indifference, mere blindness or weakness: there must be an intentional concurrence either in the actual adultery or in the conduct of the parties leading up to such adultery in order to amount to a bar.⁶

⁵ In *Glennie v. Glennie & Bowles*, 32 L. J. 17, where the petitioner had married a woman with whom he had previously cohabited, and afterwards allowed her to be visited by a young man she had known before marriage, and with whom she naturally committed adultery; Sir C. Cresswell said: "To establish connivance, it is requisite not that the party conniving should be actually an accessory before the fact so as to have taken any active measures to bring about the result of adultery, but that he should be cognizant that such a result would follow from certain transactions that he approved of and consented to, and therefore on the principle '*volenti non fit injuria*,' he cannot complain of any act he passively assented to."

⁶ *Rogers v. Rogers*, 3 Hagg. p. 59; *Moorsom v. Moorsom*, 3 Hagg. p. 107; *Marris v. Marris & Burke*, Queen's Proctor intervening, 2 S. & T. 530.

To take the husband's case:⁷ if a man sees what a reasonable man could not see without alarm, if he sees what a reasonable man could not permit, he must be supposed to see and mean the consequences; if such a state of things exists—whether brought about by the acquiescence of the husband or independently of it—which in the apprehension of reasonable men, would result in adultery, and if the husband, intending that adultery should take place, does not interfere when he might do so to protect his own honour, he is guilty of connivance.⁸

Evidence
of con-
nivance
generally
circum-
stantial.

The knowledge and willingness or acquiescence which constitute connivance must be proved like any other conclusion of fact—by express language, or by inference deduced from facts and conduct, but it is not necessary that either knowledge or

⁷ For, connivance is essentially the husband's offence and the wife's ground of defence. A woman is less open to a charge of conniving, as she is not obliged, nor is she able to keep the same watch over her husband's conduct which regard for his honour imposes upon him with respect to her behaviour with men. Besides, in some cases, forbearance is wise on her part; in others, she may yield to the necessity of her position.

In *Turton v. Turton*, 3 Hagg. 338, a suit by the wife on the ground of her husband's adultery with her sister; proof that the wife after knowledge of the previous adultery allowed her sister, under peculiar circumstances, to accompany her husband and herself to India and live in the same house with them, was held not to bar the wife by reason of connivance, as there was nothing in her conduct, however imprudent, to show that she became reconciled in the slightest degree to the continuance of the intercourse between her husband and sister.

⁸ *Moorson v. Moorson*, 3 Hagg. p. 106; *Allen v. Allen & D'Arcy*, 2 S. & T. 108, *in notis*; 30 L. J. p. 4, where see the summing up of Hill, J.

willingness should be proved affirmatively: both may reasonably be inferred from circumstances: in most cases the evidence can hardly be other than circumstantial, nor can it often happen that connivance can be established by two or three broad facts: it must be gathered from a train of conduct which the Court is to interpret as well as It can.⁹ Moreover, it is not, generally speaking, necessary to prove knowledge of and privity to the actual commission of adultery any more than it is necessary on the other side to prove a specific act of adultery. If the husband has so acquiesced in improper familiarities, or has been so extremely negligent of the conduct of his wife as to encourage such familiar intimacy as would lead to adulterous intercourse, corrupt intention on his part may be inferred.¹

The presumption of the law is, however, against connivance: it is not readily to be assumed that any man will act so contrary to the general feelings of mankind as to consent to his own dishonour; and therefore, if the facts are equivocal, or can be accounted for without the supposition of intention

Con-
nivance
not readily
to be
presumed.

⁹ *Rogers v. Rogers*, 3 Hagg. p. 60; *Moorsom v. Moorsom*, 3 Hagg. p. 106.

¹ The character of the adulterer is also to be considered. A husband who allows his wife to associate with a notorious libertine goes beyond mere carelessness, and lays himself open to the suspicion of intending the consequences that may follow. *Moorsom v. Moorsom*, 3 Hagg. p. 95. The ages of the parties are not unimportant. An elderly husband ought to exercise a more vigilant superintendence over the conduct of a young wife. *Gilpin v. Gilpin*, 3 Hagg. 153.

on his part, the Court will incline to that construction.⁴

Further; a husband cannot acquiesce in his wife's adultery with one man, and take advantage of her adultery with another: he must show himself equally awake to her conduct not only with all men but at all times; and as he cannot be allowed to say to the Court *non omnibus dormio*, so neither can he say *non semper dormio*; he cannot be allowed to connive at her adultery with one man, or at one time, and then to suit his convenience or his purse, claim a dissolution of his

⁴ *Rogers v. Rogers*, 3 Hagg. p. 61; *Moorsom v. Moorsom*, 3 Hagg. p. 107, in which case Lord Stowell in his concluding observations at p. 117, said: "In pronouncing for a separation, I feel that I shall tolerate a negligent inattention to marital duty, and that I shall pronounce a decree which will not lead to the peace and honour of families, nor to the purity of private life. . . . If the question were whether Moorsom acted as a prudent, a wise or an attentive husband, the result would be unfavourable: if it were a question whether in fact he contributed to the disgrace of his family, the answer would again be unfavourable, but the question is whether he contributed with a corrupt intention:" and held that he had not done so.

The above expressions were adopted by Dr. Lushington in *Phillips v. Phillips*,* in which case, the husband was clearly guilty of culpable indifference—with a previous knowledge of great indiscretion on the part of his wife—to circumstances which ought to have called forth his active interference, but there was nothing to show that he was cognizant of her adultery. Mr. Phillips was a professional man, whose avocations deprived him of the ordinary opportunities of observation. The adulterer was a married man and a friend.

* Ante, p. 130, note 4.

marriage on the ground of her adultery with another man, or at another time.⁵

If a husband takes money from the adulterer as a compensation for the wrong done him and to abandon his legal remedy for it, and then leaves his wife in a situation likely to occasion a renewal of the adulterous intercourse with the same person, he is "accessory" to it.

In the case of *Gipps v. Gipps* and *Hume*,⁶ the husband petitioned, in 1861, for a dissolution of his marriage on the ground of his wife's adultery with Hume. Before that petition was filed, an arrangement was made between the petitioner and a Mr. Halliwell, a common friend of the petitioner and the respondent, that £3000 should be paid by Hume to Mr. Halliwell to abide the result of the suit, and that it should be in lieu of costs and damages, and that the petition should not contain any claim for damages. The petition was accordingly filed in that form, and afterwards, the sum of £3000 was paid over to the petitioner.⁷ Just before

⁵ *Lovering v. Lovering*, 3 Hagg. 87; *Gipps v. Gipps & Hume*, 3 S. & T. 116.

In *Stone v. Stone*, 3 N. of C. p. 282, Dr. Lushington said: "I never can think that a man who has been so forgetful of his own duties, moral and religious, towards his wife, and of all feelings of honour as a gentleman as to connive at his own disgrace by being a party to her adultery with one man, can come to a Court of Justice with clean hands and seek a separation for the subsequent conduct of his wife, to whose guilt he had been as it were foster-father."

⁶ 3 S. & T. 116.

⁷ Sir C. Cresswell, in giving judgment, observed that "this

the trial came on in June, 1861, Gipps signed a paper by which he undertook in consideration of the receipt of £3000 from Hume as costs and damages, and upon Hume securing to him the further sum of £4000, to withdraw his petition. It was found that the record could not be withdrawn, but on the jury being sworn, no evidence was given, and a verdict was taken for the respondents. The parties failed to agree upon the terms of a separation deed between Gipps and his wife, and Hume refused to pay the £4000. In June, 1862, Gipps filed a petition for dissolution of marriage by reason of his wife's adultery in and since August, 1861. Hume pleaded, among other things, connivance: the Court held that Gipps, by foregoing his claim to a divorce for the previous adultery in consideration of a sum of money without making any stipulation as to his wife's future conduct, had shown himself so regardless of his and her honour that he must be taken to have given a tacit consent to any future intercourse between her and her paramour, and dismissed his petition.⁸

Effect and
construction
of
deeds of
separation.

In some cases, the question of connivance has been raised where adultery has been committed by the husband or the wife under cover of a deed of separation.⁹ In such cases, the Court will not rely

was as like a petition filed by collusion as could well be." The question of collusion, however, was not raised.

⁸ Affirmed on appeal to the House of Lords, 11 H. of L. cas. 1; 33 L. J. 161.

⁹ Though the mere separation of husband and wife is no

wholly and solely on the terms of the deed; but will investigate the circumstances under which the deed was entered into, and will entertain the broad question whether, taking the deed itself and all the surrounding circumstances into consideration, the husband or wife did in fact consent that the other should live in adultery, and when the whole matter is placed before It, the Court will not determine that there was connivance unless It sees its way very clearly to the conclusion that it was the intention of the petitioner to connive.

In the case of *Barker v. Barker*,¹ which has given the law to subsequent cases of this sort, the husband covenanted and agreed in the deed of separation "that it shall and may be lawful for the said Amelia P. Barker (the wife) from time to time and at all times during the present coverture to live separately and apart from him the said Samuel Barker in such manner and at such place and places, and with such person and persons as the said A. P. Barker shall from time to time think proper to choose—notwithstanding her present coverture—and as if she were sole and unmarried." The wife was said to have been living with another man at the time when that deed was executed, and

bar to relief at the suit of one for adultery committed by the other, yet where a separation has subsisted at the time of the adultery charged, it is peculiarly incumbent on the party charging it—especially that party being the husband—to make out most satisfactorily that the injury complained of is not one to which the complainant was in any sort accessory. *Barker v. Barker*, 2 Add. p. 288.

¹ 2 Add. 285.

it was held in the first instance that the deed amounted to a licence or consent on the part of the husband that she should continue to do so. But on appeal to the Court of Arches, Sir J. Nicholl came to the conclusion that there was no connivance on the part of the husband, and that notwithstanding the formal words which had been introduced into the agreement, the husband never intended to consent, and never did consent that the wife should lead an abandoned life; and treating the deed only as evidence that might be rebutted by other evidence, he considered that the evidence which had been given before him was sufficient to rebut it, and that the deed of separation was understood neither by husband nor wife as dispensing to either with the obligation of fulfilling the marriage vow in the article of fidelity, so far as the consent of the other party was concerned, however the contrary might seem upon the mere wording of the deed.²

In *Studdy v. Studdy*,³ the parties executed an agreement to live separate on certain conditions: the last clause in the agreement was as follows:—“Mrs. Studdy promises that if she does not fulfil her part of the agreement, Major Studdy shall have the full power of a husband over her, whatever his

² So in *Sullivan v. Sullivan*, 2 Add. 299, a suit for nullity having failed, the parties separated under a deed of separation, precisely similar to that in *Barker v. Barker*, and the wife formed an adulterous connexion: the deed was held to be no bar to the husband's suit for divorce.

³ 1 S & T. 321.

way of living may be." She subsequently petitioned for a judicial separation by reason of her husband's adultery before the separation—then unknown to her—and also since the separation. The husband pleaded connivance, and in support of it relied upon the above clause in the agreement. It was held that the words in the agreement, "whatever his mode of living may be," might be construed to apply to the place where and the mode in which the husband might choose to live in reference to his establishment; and that as an innocent meaning might fairly be given to these words, the Court would not presume the immoral contract asserted to have been intended, and that the petitioner was therefore entitled to the relief prayed.*

But in *Thomas v. Thomas*,⁵ where the husband and wife executed a deed of separation in 1854 which recited, amongst other things, that the husband had for some months been living with a Miss H., and referred to certain articles of agreement concerning certain trust moneys and other property to which Miss H. as well as the husband and wife had been parties; and in 1860, the wife petitioned for a judicial separation on the ground of her husband's adultery with Miss H. in 1858-9: the Court held that the execution of the deed of separation by the wife knowing at the time that her husband was cohabiting with H. was virtually a

* Affirmed on appeal to the full Court, 28 L. J. 105.

⁵ 2 S. & T. 113.

consent to the continuance of such cohabitation, and dismissed the petition.

Again, in *Boulting v. Boulting*,⁶ the parties having been married in 1833, separated in 1835 under an ordinary separation deed by which the husband made his wife a weekly allowance. He cohabited with another woman from and after 1842, of which adultery the wife became aware in 1843, but she never complained nor made any remonstrance—although living not far from her husband—until she filed her petition in 1863: her long silent acquiescence was held to constitute a willing consent to, and connivance at her husband's adultery.⁷

Deed of separation securing allowance not necessarily proof of connivance.

But, a deed of separation securing an allowance to the wife does not prove connivance at her husband's adultery unless there is evidence that at the time it was entered into, the wife was aware of such adultery and consented to its being continued. Such consent may be willing or unwilling, for if a wife were to consent, as one of the conditions of the grant of an allowance, to her husband continuing an adulterous intercourse, such consent would amount to connivance, even if it were extorted from her by the pressure of the circumstances in which she was placed, unless of course the pressure to which she was subjected amounted to that degree of force which would invalidate any agreement. She might be very unwilling to consent, but if in

⁶ 3 S. & T. 329.

⁷ See this case again, post, p. 161, under the head of "Unreasonable delay."

the end, she were to withdraw her scruples for the sake of getting an allowance, she would be guilty of connivance.⁸

To condone is to forgive, and as it is not right Condo-
nation. that a person should be allowed to sue in respect of an injury that has been pardoned—condonation is that species of forgiveness or reconciliation which in furtherance of the marriage-bond, the law has erected into a bar to proceedings for a divorce; and has been defined as a “blotting out of the Definition. offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed.”⁹

Now, though the essence of condonation is ‘forgiveness,’ it means much more than is expressed by this word as commonly understood: it is a forgiveness legally releasing the offence; and to be complete, must be followed by conjugal cohabitation, though not necessarily by connubial inter-

⁸ *Ross v. Ross*, L. R. 1 P. & D. 734.

⁹ *Keats v. Keats & Montezuma*, 1 S. & T. pp. 346, 354.

Condonation is a technical word, and as a legal term has acquired a peculiar signification beyond its proper meaning of pardoning, forgiving, or remitting a debt: though well understood, it had never been defined until the necessity arose for defining it in the above case.

Condonation may be pleaded consistently with a traverse. For instance, the respondent may in one paragraph deny the adultery charged, and in another, allege that the said adultery if any was condoned.

When condonation is in issue before a jury, it is a question of fact to be decided by them subject to the explanation of it given them by the Court. *Peacock v. Peacock*, 1 S. & T. 183.

Condonation by the husband.

course : it may be accompanied with conditions, for a wife, who by her infidelity has forfeited her title to be regarded as a wife, cannot expect an entire reinstatement in her former position ; that is beyond the power of the husband to accomplish.¹

Condonation further signifies forgiveness of a conjugal offence with full knowledge of all its particulars; and as a wife by her adultery inflicts the greatest of social injuries upon her husband, and one which he is not supposed readily to forgive²—it follows that a woman who sets up condonation as an answer to a charge of adultery must prove that her husband took her back, or continued to live with her after full knowledge of and belief in her guilt, and with the intention of forgiving her.³

¹ See *Beeby v. Beeby*, 1 Hagg. p. 793 ; *Keats v. Keats & Montezuma*, 1 S. & T. 334, in which case an attempt was made to establish condonation from verbal expressions of forgiveness on the part of the husband.

² *Fatuus est qui meretricem retinet* ; a husband who forgives adultery with such facility as to show no sense of injury, and takes no care to prevent its happening again has no ground of complaint, for he encourages the adultery by his conduct. In *Dunn v. Dunn*, 2 Phill. 403 ; 3 Phill. 6, the husband received his wife back after she had eloped with his friend, without much inquiry, and subsequently, she eloped again. Sir J. Nicholl held that he was not entitled to sue, but on appeal, the sentence was reversed.

³ In *Best v. Best*, 1 Add. 411, the husband having detected an epistolary correspondence between his wife and a man—with whom she was afterwards proved to have committed adultery—but which he treated very lightly, continuing to cohabit for two years, and not setting up the charge of adultery till she sued on account of his cruelty—it was held to be such a

On the other hand, if the evidence leads the Court to the conclusion that the husband did not thoroughly believe that his wife had been guilty and therefore did not forgive her when he took her back, condonation is not established.⁴

Condonation on the part of the wife may be considered under two heads: adultery and cruelty. Condonation by the wife. Now, whereas condonation by the husband of his wife's adultery is degrading and dishonourable; forbearance on the part of the wife in bringing her suit, especially if she have a family, in the hopes of reclaiming her husband, is not only excusable, but meritorious. Condonation is not construed so strictly against the wife, for she has not the same control over her husband, nor the same means to enforce the observance of the matrimonial vow: his guilt is not of the same consequence to her; her honour is less injured and more easily healed. Her submission therefore to her husband's embraces is not considered so strong proof of condonation as his continuing or renewing intercourse with her.⁵ She does not forfeit her right to com-

constructive condonation, such a want of proper feeling for his own honour, such negligence as to disentitle him to a decree.

In *Dillon v. Dillon*, 3 Curt. 112, it was said "if a husband has received reasonably probable information of his wife's adultery, and continues cohabitation, that is condonation."

Indeed, so great facility of condonation on the part of a husband leads to an inference of connivance.

⁴ *Ellis v. Ellis & Smith*, 4 S. & T. 154.

⁵ *Durant v. Durant*, 1 Hagg. p. 752; *Ferrers v. Ferrers*, 1 Consist. 133; *Westmeath v. Westmeath*, 2 Hagg. suppt. p. 113;

plain at last, unless she has shown by repeated forgiveness an insensibility to the injury.⁶

Condonation
of
cruelty.

The wife's forgiveness of cruelty is to be regarded in a somewhat different light from that of adultery. Except in cases where her health and comfort are affected by her husband's infidelity, she may more easily forgive the latter than the former offence.

As cruelty in almost every instance is progressive and cumulative, and consists of successive acts of ill-treatment at least, if not of personal injury, there must, in most cases, be something of a condonation of the earlier acts ; but complete forgiveness is not to be too readily presumed from the wife continuing in cohabitation even after several acts of cruelty. Such continuance may be caused by the apprehension of some evil which is considered greater than the peril of personal injury—such as the privation of children, and their removal to a foreign land under the unrestricted control of a harsh and excitable father.⁷

D'Aguilar v. D'Aguilar, 1 Hagg. p. 786; *Beeby v. Beeby*, 1 Hagg. p. 793; *Dance v. Dance*, 1 Hagg. p. 794, *in notis*.

⁶ In *Angle v. Angle*, 6 N. of C. p. 197, it was said: "it is no bar to her suit for her husband's adultery that she was reluctant to quit his society, notwithstanding long suffering and even condoning his offence, until she finds all her hopes of his reformation frustrated."

⁷ *Westmeath v. Westmeath*, 2 Hagg. suppt. p. 113; *Curtis v. Curtis*, 1 S. & T. p. 200, where Sir C. Cresswell expressed much doubt whether the wife merely by accompanying her husband to America from fear of being deprived of her children, could be held to have condoned her husband's

How long cohabitation may be continued without legal forgiveness of cruelty must depend upon the circumstances of each case. The general presumption is that a husband and wife living together in the same house do live on terms of matrimonial cohabitation, from which condonation may be inferred, but particular circumstances may repel that presumption.⁸

Proof of
condona-
tion.

An extorted or forced return to or continuance in the husband's house without connubial intercourse would not amount to complete forgiveness.⁹ Even the presumption arising from the continuance to share the husband's bed may, under special circumstances, be repelled.

This question was well considered by Dr. Lushington in *Snow v. Snow*,¹ where, after reviewing the previous cases, he observed: "I think I am justified in saying that connubial cohabitation after the last act of cruelty is not necessarily and universally a bar, as condonation, to a wife's suit, even though such cohabitation may be in one sense a voluntary cohabitation, or may not be forced or fraudulently brought about by the husband. There are many circumstances in which it would be exceedingly difficult if not impossible for the wife to withdraw from cohabitation especially when abroad; and if such continued cohabitation were wholly unaccom-

cruelty. It was not necessary however to determine the question.

⁸ *Beeby v. Beeby*, 1 Hagg. suppt. 796.

⁹ *D'Aguilar v. D'Aguilar*, 1 Hagg. suppt. p. 782.

¹ 2 N. of C. suppt. p. xvii.

panied with any intention to condone, and attended by a determination to separate on the first safe opportunity, I think the Court could not hold the wife to be entirely deprived of all remedy in cases of great cruelty where there was no reason to believe—to use Lord Stowell's expression—that the husband was *emendatus moribus*. The Court must consider the safety of the wife: a continuance to share the husband's bed may not, under certain circumstances, in the least degree prove that she was not afraid of renewed violence or that the husband repented his past cruelty and intended to treat her with conjugal kindness. I am therefore under the necessity of saying that the general principle of condonation arising from connubial intercourse, though not absolutely forced or fraudulent, and of such condonation operating as a bar, does not in all cases of cruelty universally apply to a wife, and that whether such connubial intercourse shall operate as a bar must depend on all the circumstances of each individual case.²

REVIVAL OF CONDONED OFFENCES.

Condonation is not an absolute but a conditional forgiveness, the condition being the future matrimonial good conduct of the party forgiven.³ If a

² In *Turner v. Turner*, 2 Eccl. & Adm. 201, *in notis*, it appearing that the wife had returned to her husband's bed only under the influence of fear, his cruelty was held not to have been condoned, and a divorce was granted.

³ *D'Aguilar v. D'Aguilar*, 1 Hagg. suppt. p. 782; *Durant v. Durant*, 1 Hagg. 762.

husband has condoned his wife's adultery with one man, and she commits adultery with the same man, or with another, the condoned adultery thus revived⁴ is a material fact which ought not to be suppressed;⁵ and in the latter case, he ought in his petition to allege both adulteries, and to make both the adulterers co-respondents.

Assuming that cruelty in the legal sense has been committed, and has been fully condoned by continuous or by renewed cohabitation; it may be revived either by subsequent acts of cruelty, or by harsh and degrading conduct short of personal violence, or even by threats, if of such a nature and

Revival of
condoned
cruelty.

⁴ See *Winscom v. Winscom & Plowden*, 3 S. & T. 380, already referred to, ante, p. 69, with respect to the revival of condoned adultery by improprieties short of, but tending to, adultery.

But it must be remembered that repeated condonation by a husband may be turned against him, as evidence of connivance on his part.

⁵ The suppression of such a material fact is sufficient to justify a third person, or the Queen's Proctor, in intervening under s. 7 of 23 & 24 Vict. c. 144, but when the material fact, whatever it may be, is placed before the Court, there is nothing in that section which would justify the Court in withholding a decree, if upon the whole, supposing the fact had been brought to light in the first instance, the petitioner would have been entitled to it.

In *Alexandre v. Alexandre*, the Queen's Proctor intervening, L. R. 2 P. & D. 164, the husband's petition contained two charges of adultery with some persons unknown, and a decree *nisi* was pronounced. The Queen's Proctor intervened and proved condonation by the petitioner of the wife's first adultery. The Court made the decree absolute on the ground of the uncondoned adultery, notwithstanding the suppression of the material fact of condonation of the other adultery.

so expressed as to cause a reasonable apprehension of further violence, or that cohabitation would be attended with danger, less being sufficient to destroy condonation than is required to found an original suit; but to have that effect, the conduct must be of the nature of legal cruelty, such as might justly revive the fear of injury attributed to the original acts.⁶ Further, the force of the reviving acts may depend much upon the nature of the original cruelty, which, if of a very gross kind—such as to involve danger of life—would be more easily revived than if it were of a slighter description.⁷

By adultery.

This conditional forgiveness extends not only to a repetition of the same, but to the commission of

⁶ *Westmeath v. Westmeath*, 2 Hagg. suppt. p. 53; *Curtis v. Curtis*, 1 S. & T. 192, and on appeal, 4 S. & T. 234; *Bostock v. Bostock*, 1 S. & T. 221; *Cooke v. Cooke*, 3 S. & T. 126, 246.

⁷ See *Evans v. Evans*, 7 Jur. 1046; 2 N. of C. 470. In this case, Dr. Lushington held that, whatever might have been the nature of the cruelty, the wife by instituting a suit for restitution of conjugal rights, and returning to cohabitation, had completely condoned such cruelty. But in *Wilson v. Wilson*, 6 N. of C. 290, the wife had separated from her husband by reason of his gross personal violence, but subsequently, for the sake of maintenance, sued for restitution of conjugal rights which was decreed, and she returned to cohabitation, when his threats and language were such as justified a reasonable apprehension of violence, and on her petition a divorce was pronounced. On appeal to the Privy Council, the decree was affirmed, and it was held that the renewal of the cohabitation by virtue of the sentence of the Ecclesiastical Court was not a condonation of the former cruelty. 6 Moo. P. C. C. 484.

See also, *Neeld v. Neeld*, 4 Hagg. p. 268.

any other marital offence which falls within the cognizance of the Court: it therefore follows that condoned cruelty may be so revived by subsequent adultery, as together to found a suit for dissolution; and on the same principle, condoned adultery may be revived by subsequent cruelty.⁸ Further to explain this: suppose a wife has completely forgiven her husband's cruelty by continuing to cohabit with him, and he afterwards leaves her and cohabits with another woman; or suppose she has in like manner forgiven his adultery, and he afterwards treats her with cruelty—in either case, the condoned offence is revived by the one subsequently committed.

Cruelty
reviving
condoned
adultery.

Full knowledge however of a marital offence is necessary to its full condonation: a husband may have been carrying on an adulterous intercourse unknown to his wife at the same time that he has been guilty of cruelty towards her. If then she continues to live with him so as to condone such cruelty, being at the time ignorant of his adultery, and if upon afterwards becoming aware of it, she takes action thereon, the condoned cruelty is so

Full know-
ledge of
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cessary.

⁸ *Worsley v. Worsley*, 2 Lee, 572; *Durant v. Durant*, 1 Hagg. suppt. 765; *Bramwell v. Bramwell*, 3 Hagg. p. 635; *Palmer v. Palmer*, 2 S. & T. 61; *Dent v. Dent*, 4 S. & T. 105.

It has been held that cruelty to revive adultery may be less violent in degree than when it forms an original charge. In *Durant v. Durant*, 1 Hagg. p. 769, it was said that a groundless charge of misconduct and criminality under pretence of which the husband turned his wife out of doors in the face of her family and her children might suffice to revive his adultery often condoned by her.

revived by the subsequent discovery of the adultery as to entitle her to petition for dissolution of marriage.⁹

Even after a woman has obtained a decree of judicial separation on the ground of her husband's cruelty, she may, on proof of his subsequent adultery, petition for dissolution of marriage.¹ But, if her suit for judicial separation has been dismissed, the charges of cruelty not having been proved, she is estopped from setting up the same charges of cruelty coupled with adultery in a subsequent petition for dissolution.²

I have endeavoured, without refining, clearly to explain the important doctrine of condonation and revival; for the question arises in some degree in the institution of almost every suit. It rarely happens—especially where the wife is complainant—that action is or can be taken upon the first discovery of the adultery, or upon the first blow being struck.

The following case is a further illustration of the principles above laid down, though the question raised was rather in respect of an agreement not to sue than of condonation properly so called..

Condi-
tional
agreement
to forgive
incestuous
adultery.

In *Newsome v. Newsome*,³ the wife, having discovered that her husband had been guilty of incestuous adultery, entered into an agreement with

⁹ *Dempster v. Dempster*, 2 S. & T. 438; *Waddell v. Waddell*, 2 S. & T. 584.

¹ *Bland v. Bland*, L. R. 1 P. & D. 237.

² *Finney v. Finney*, L. R. 1 P. & D. 483.

³ L. R. 2 P. & D. 306.

him, by which, in consideration of his retiring from partnership with her father and brother, she agreed to forgive him, and not to take any proceedings in the Divorce Court; and though they were not to live together, they were to meet from time to time—and did so meet, but whether on those occasions, condonation took place by conjugal intercourse, was not clearly proved. The agreement also contained a clause that it should be binding only so long as the husband remained “true to the wife in love and duty.” He subsequently committed adultery, by which the Court held that the wife was set free from the agreement; that the incestuous adultery was thereby revived, and that she was therefore entitled to a divorce.

To collude is to conspire in a fraud: the parties *Collusion*, to a cause are guilty of collusion when they are acting in concert together, either by keeping back evidence of what would be a good defence; by agreeing to prove a real case; or by agreeing to set up a false one.

Collusion may be found by the Court on the evidence adduced in relation to the petition,⁴ as in *Lloyd v. Lloyd and Chichester*,⁵ in which case the

⁴ Divorce Act, s. 30, ante p. 125.

⁵ 1 S. & T. 567. Any communication between the opposite parties with the view of facilitating the proceedings should be avoided as it may give rise to a suspicion of collusion. In *Harris v. Harris & Lambert*, 4 S. & T. 232, the respondent, who did not appear in the suit, gave the petitioner's attorney a photograph to aid in proving her identity, and attended in

adultery of the respondent was clearly proved; but it appeared that the petitioner had bargained for and had received a sum of money from the respondent's father on signing the petition, and that the agent employed by the petitioner to get up the evidence had been living familiarly with the respondent and co-respondent, and had advanced money to the latter: it was held that the evidence of collusion was too gross and palpable to be overlooked, and the petition was dismissed.⁶

Again, in *Todd v. Todd*,⁷ the wife's suit for dissolution of marriage, it was shown that the adultery charged was committed by the husband in fulfilment of a promise previously made by him to the petitioner that he would give her an opportunity of obtaining a divorce; that the adultery had been committed in order that it might be proved; that evidence of it had been obtained by means of information supplied to the wife by the husband; and that the wife was acting in concert with the husband to obtain evidence of it by the means indicated by him: her petition was dismissed.

The Court has not often, however, the means of discovering collusion, and it is therefore more particularly the subject of intervention by the Queen's

in Court for the same purpose, for which she received from the petitioner's attorney £1. The Court, upon consideration, having no reason to believe that the parties were acting in collusion, made the decree.

⁶ And see *Chisim's case*, Macqueen's Practice of the House of Lords, p. 582.

⁷ L. R. 1 P. & D. 121.

Proctor upon information given to him by any person interested in the suit.⁸

The fact that a husband makes his wife an allowance in lieu of alimony whilst a divorce suit is pending is not of itself proof of collusion.

But in *Barnes v. Barnes* and *Grimwade*,⁹ it appeared that the husband had several interviews with his wife both before and after he presented his petition for dissolution of marriage, and at those interviews, gave her money and urged her not to oppose the petition; and promised that if she kept quiet, he would do no harm to the co-respondent, and would be a friend to her after the decree was obtained: collusion was held to have been proved, the respondent and the co-respondent not having appeared at the hearing of the cause.

DISCRETIONARY BARS.

Adultery proved to have been committed by the petitioner at any time during the marriage—except ^{Adultery of the petitioner.} in rare cases, under special circumstances to be presently stated—is practically a bar to a suit for

⁸ In *Jessop v. Jessop*, 2 S. & T. 301, it was held that the petitioner is entitled to be made acquainted with the character of the collusion intended to be charged by way of particulars.

In *Cox v. Cox*, 2 S. & T. 306, cause was shown by the Attorney General against the decree being made absolute on the ground that the petitioner's suit had been chiefly conducted by the managing clerk of the attorney who had entered an appearance on behalf of the respondent; but on explanation the charge of collusion was not sustained.

⁹ The Queen's Proctor intervening, L. R. 1 P. & D. 505.

dissolution of marriage or for judicial separation on the ground of any matrimonial offence on the part of the respondent.¹

In *Latour v. Latour and Weston*,² the petitioner had obtained a decree for a divorce *a mensâ et tora* from the Ecclesiastical Court in 1838, and from that time, his wife had continued to live with the adulterer. The petitioner, treating himself as thus divorced from his wife, had since lived and cohabited with another woman. After the passing of the Divorce Act, he petitioned in April, 1859, for a dissolution of his marriage, and without in any way advertg to his own adultery, obtained a decree *nisi*. But the Queen's Proctor intervened, and the petitioner's adultery having been proved—though it was strenuously contended that such adultery could in no way have contributed to his wife's mis-

¹ In *Drummond v. Drummond*, 2 S. & T. 269, the wife petitioned for dissolution of marriage on the grounds of adultery and cruelty, to which the respondent did not appear; but the Queen's Proctor intervened and alleged her adultery since the filing of the petition. Leave was then asked to amend the petition by praying for a judicial separation, but the Court would not allow the Queen's Proctor's right to intervene to be so defeated.* The cruelty only of the respondent was proved, and the petitioner's adultery. It was argued that she was nevertheless entitled to a decree on the ground of cruelty; but the Court dismissed her petition, holding that a wife guilty of adultery cannot be a petitioner in the Divorce Court on the ground of any matrimonial offence of the husband.

* The Queen's Proctor having by the statute a right to intervene only in suits for dissolution of marriage.

² 2 S. & T. 524; and on appeal, as *Latour v. The Queen's Proctor*, 10 H. of L. cas. 685.

conduct, and was under circumstances of great mitigation—the Court held that it was not a fit case for Its discretion, and dismissed the petition.

In *Barnes v. Barnes and Beaumont*,³ the jury found that the respondent had committed adultery with the co-respondent, and that the petitioner had also committed adultery, but they could not say where or with whom, or whether it was with the knowledge or consent of the respondent. The co-respondent having obtained an order for a new trial, the Court intimated that the petitioner might also have a new trial on the question of his adultery, but he refused it. On motion for a decree, the Court declined to exercise Its discretion by passing over the verdict of the jury or by pronouncing a decree in favour of the petitioner notwithstanding the verdict.

Even a single act of adultery may suffice. In *Clarke v. Clarke and Clarke*,⁴ the petitioner, after his case had been proved, tendered himself for examination, and stated that on one occasion during a temporary separation from the respondent, he had been guilty of adultery with a woman whom he had never seen before or since. The Court, somewhat reluctantly, dismissed his petition.

Nor is it necessary that the adultery of the petitioner should have in any way conduced to that of the respondent.

In *Morgan v. Morgan and Porter*,⁵ the petitioner

Single act sufficient.

Need not have conduced to respondent's adultery.

³ L. R. 1 P. & D. 572.

⁴ 34 L. J. 94.

⁵ L. R. 1 P. & D. 644. In this case, the Judge Ordinary, in reviewing the previous decisions, observed that "in cases

had, some years before instituting his suit, been guilty of adultery, though at that time unknown to the wife: there being no special circumstances in the case, beyond mere lapse of time, to justify the exercise of Its discretion, the Court refused a decree.

Effect of
condona-
tion.

Although the adultery of the petitioner may have been condoned by continued cohabitation, the petitioner does not thereby necessarily become *rectus in curiâ*, so as to preclude the Court from taking such adultery into consideration. In *Goode v. Goode and Hamson*,⁶ the husband and wife having quarrelled, the husband left her and formed an adulterous connexion with a young woman by whom he had a child. They afterwards became reconciled and lived together, but unhappily, the husband often treating his wife with great violence, until at length she went away, and committed adultery with the co-respondent. The Court, looking at all the circumstances, dismissed the petition.

Upon this question, however, a distinction may be drawn between suits for dissolution of marriage and for judicial separation,⁷ and an act of adultery

where the adultery complained of has no special circumstances attending it, and no special features placing it in some category capable of distinct statement and recognition, there would, I think, be great mischief in this Court assuming to itself a right to grant or withhold a divorce upon the mere footing of the petitioner's adultery being, under the whole circumstances of each case, more or less pardonable or capable of excuse."

⁶ 2 S. & T. 253.

⁷ In *Seller v. Seller*, 1 S. & T. 482, the husband had con-

might not be so strongly pressed against a petitioner for the lesser remedy as against one who prays for a complete divorce.

But there certainly may be cases in which an act of adultery committed by a petitioner to the knowledge of the respondent, and by him or her long since pardoned and condoned, ought not to preclude the petitioner from all remedy for the subsequent adultery of the respondent; for otherwise, a sort of licence to commit adultery without punishment would be set up on one side by guilt on the other.⁸ It was probably on this ground, and in order to meet the case of some temporary and comparatively venial lapse on the part of a husband—for a lapse on the part of a wife can never be venial—that the discretionary power was vested in the Court of overlooking the adultery of the petitioner.

doned his wife's adultery—in respect of which he had obtained a divorce *a mensâ et toro*—by renewed cohabitation: the wife afterwards petitioned for judicial separation on the ground of his adultery; and it was held on demurrer that her adultery, having been condoned, was no bar to her suit.

This case was decided on the authority of *Anichini v. Anichini*, 2 Curt. 210, in which the wife sued for restitution of conjugal rights: the husband pleaded her adultery, and prayed a divorce: the wife then recriminated: the husband replied, condonation of his guilt. Dr. Lushington decided that the adultery of the husband, having been condoned, was no bar to his prayer for divorce on account of the adultery of the wife, which was accordingly decreed.

⁸ See *Anichini v. Anichini*, 2 Curt. pp. 218-9; *Morgan v. Morgan & Porter*, L. R. 1 P. & D. p. 646.

Cases in which the Court has exercised its discretion.

The following are the classes of cases in which this discretion has been exercised.

In *Coleman v. Coleman*,⁹ the wife's suit for dissolution of marriage, it was proved that the respondent had been guilty of adultery and cruelty, and also that he had by threats and by personal violence coerced the petitioner into leading a life of prostitution, and had lived upon the money which she so obtained. The Court being satisfied that she had led this life contrary to her own will and desire, and in consequence of the coercion of the respondent, granted her a decree notwithstanding her adultery.

In *Joseph v. Joseph and Wentzell*,¹ the husband having instituted a suit for dissolution of marriage, was led to believe that his wife was dead, and acting on that belief, married again; but afterwards, finding that she was still alive, proceeded with his suit. The Court being satisfied that his adultery had been committed under the *bonâ fide* impression that his wife was dead, granted a decree.

Again, in *Noble v. Noble and Godman*,² after a decree *nisi* had been pronounced, but before the decree was made absolute, the petitioner went through a form of marriage, and cohabited with a female. The Court being satisfied that he had done so in ignorance of the law, and in the *bonâ fide* belief that his first marriage was finally dissolved, determined that it was a case in which It could exer-

⁹ L. R. 1 P. & D. 81.

¹ 34 L. J. 96.

² The Queen's Proctor intervening, L. R. 1 P. & D. 691.

cise its discretion in favour of the petitioner, and made the decree absolute.

In the remarkable case of *Conradi v. Conradi and others*,³ the petitioner established his wife's adultery, but the co-respondent proved that the petitioner had committed adultery, and on that ground his petition was dismissed. He afterwards presented a fresh petition, alleging subsequent adultery with other co-respondents : the Queen's Proctor intervened, and alleged the judgment against the petitioner in the previous suit,⁴ and further, the fact of the petitioner's adultery. The jury found a verdict in favour of the petitioner. The Court, however, held that the judgment in the former suit was conclusive evidence of the petitioner's adultery; but in the exercise of Its discretion, granted a decree *nisi*, notwithstanding that judgment, on the grounds that the act of adultery, if committed, had been an isolated one; that it had no connexion whatever with the desertion by the respondent of her home, nor with her abandoned life; and that the finding of the jury in the second suit, acquitting the petitioner, had thrown doubt upon his guilt.

As the decree *nisi* and the decree absolute are the beginning and ending of the same act, and as the marriage remains undissolved until the decree

Adultery
of peti-
tioner
after
decree
nisi.

³ The Queen's Proctor intervening, L. R. 1 P. & D. 514.

⁴ This allegation had been demurred to, but the demurrer was overruled on the ground that whether the finding in the previous suit were admissible or not, it was a material fact for the consideration of the Court. L. R. 1 P. & D. 391.

absolute, the obligations of marriage in respect of adultery equally remain. The Queen's Proctor may therefore intervene and allege adultery committed between the decrees.⁵

Unreasonable delay.

Unreasonable delay as a bar to a suit for dissolution of marriage, as intended by the 31st section of the Divorce Act, must be taken to mean that kind of delay which would show the petitioner to have been insensible to the loss of his wife: it must be a culpable delay, so as to be almost equivalent to connivance or acquiescence; or such as to lead the Court to infer condonation or a want of sincerity in the purpose for which the suit is instituted.⁶

Generally speaking, however, delay can be explained and satisfactorily accounted for, and cannot in any case be justly imputed to a petitioner, whether husband or wife, who has been unable to proceed from want of means or other inevitable or justifiable circumstances.

In *Newman v. Newman*,⁷ the wife separated from her husband in 1850 by reason of his incestuous adultery with her sister, and in 1868 she petitioned for dissolution of marriage on that ground. In explanation of the delay in instituting pro-

⁵ *Hulse v. Hulse & Tavernor*, the Queen's Proctor intervening, L. R. 2 P. & D. 259.

⁶ *Best v. Best*, 2 Phill. 161; *Ratcliffe v. Ratcliffe & Anderson*, 1 S. & T. 473; *Pellew v. Pellew & Berkeley*, 1 S. & T. 553; *Tollemache v. Tollemache*, 1 S. & T. 557; *Harrison v. Harrison*, 3 S. & T. 362.

⁷ L. R. 2 P. & D. 57.

ceedings, she stated that her mother was very reluctant to have the scandal in the family exposed, and that she yielded to her mother's urgent entreaties, but that on her mother's death she presented her petition. The Court held that though there had been unreasonable delay, yet, looking at all the circumstances of the case, the petitioner was entitled to a decree.

In suits for judicial separation, delay, though it cannot be pleaded as a bar, may be taken into consideration by the Court; and its true effect in these suits was well expounded by Lord Stowell in *Mortimer v. Mortimer*.⁸ "The first thing which the Court looks to when a charge of adultery is preferred is the date of the charge relatively to the date of the criminal fact charged and known by the party; because if the interval be very long between the date and knowledge of the facts, and the exhibition of them to this Court, It will be indisposed to relieve a party who appears to have slumbered in sufficient comfort over them; and It will be inclined to infer either an insincerity in the complaint or an acquiescence in the injury, whether real or supposed, or a condonation of it. It therefore demands a full and satisfactory explanation of this delay in order to take it out of the reach of such interpretations."

In *Boulting v. Boulting*,⁹ the parties were married in 1833, and from and after 1835 lived apart under an ordinary separation deed, by virtue of which the

⁸ 2 Consist. 313.

⁹ 3 S. & T. 329.

husband made his wife an allowance. About 1842, he commenced an adulterous cohabitation with a woman, of which the wife became aware in 1843, and which continued to the time of the hearing of her suit for judicial separation on the ground of that adultery, in 1863. The Judge Ordinary, in giving judgment, observed:—"The petitioner must feel and suffer under the wrong of which complaint is made, and the Court must be satisfied that the remedy is sought as a genuine relief from the pressure of that grievance. . . . But the Court looks in vain for any legitimate cause why she should suddenly regard her husband's conduct now in any different light from that of past days. Her husband has not interfered with her, has not changed his conduct towards her, or his own mode of life. . . . Does the wife desire separation? she has it, in fact, already. Does she require support? She has that too, and upon terms arranged by herself. The Court cannot believe in the sincerity of such a suit, and must withhold from Mrs. Boulting any relief now founded upon an adulterous connexion over which for years she seems to have 'slumbered with sufficient comfort.'"

In cases of
cruelty.

. The same principle is applied to suits on the ground of cruelty; for as the reason of the Court's interposition in such cases is the necessity of giving relief to the suffering party, lapse of time between the acts complained of and the institution of the suit will be taken into consideration if it appears that the suit is not in a legal sense sincere; but that it has been instituted not for the protection

of the petitioner's person, but for some collateral purpose.

In *Matthews v. Matthews*,¹ the parties having been married in 1844, lived together till 1853, when a deed of separation reciting mutual differences was executed, and the cohabitation ceased. In 1856, the wife petitioned for judicial separation, and proved certain acts of cruelty. The Court dismissed the petition, as it appeared that the proceedings were not for the *bonâ fide* purpose of protecting the wife from the cruelty of her husband, but to put herself in a better position with respect to certain property than she occupied under the deed of separation.

But in the subsequent case of *Cooke v. Cooke*,² the wife, after leaving and returning to her husband's house on various occasions, finally separated from him in 1856 by reason of his cruelty. In 1857, an agreement was come to by the mediation of friends, that she should pay her husband a portion of income settled to her separate use, and

¹ 1 S. & T. 499; on appeal, 3 S. & T. 161; 29 L. J. 118, 120.

In *Williams v. Williams*, L. R. 1 P. & D. 178, the husband, in answer to his wife's petition on the ground of cruelty, pleaded a traverse and condonation, and that the petitioner had executed a deed of separation under which he had paid her a certain allowance, and "that by reason of the premises the petitioner was not entitled to sue for a judicial separation;" and further that the suit was not instituted *bonâ fide*, but for the purpose of obtaining an increased allowance. The Court allowed these paragraphs to stand, but directed that the words "that by reason of the premises the petitioner is not entitled to sue," &c. should be struck out.

² 3 S. & T. 126; and on appeal, 246.

that he should allow the children to visit her from time to time. She paid the money, but in the early part of 1862, three years had elapsed since he had allowed the children to visit her, and he then refused, though she was very ill. In July, 1862, she petitioned for judicial separation. The Court gave judgment in her favour, being of opinion that the reluctance of the wife to prosecute the suit against her husband was no bar to her proceeding, for it appeared that she was willing to have lived with him if she could have done so with due regard to her personal safety; and that as she could not have such access to her children as she was entitled to have unless she either returned to live with her husband, or was separated from him by judicial sentence—and her evidence showed that she had reasonable ground for apprehending personal violence if she did return to him—that she was well warranted in prosecuting her suit, though one object of it might be the gaining access to her children from which she was debarred by fear of personal violence if she returned to cohabitation.

Cruelty. Although cruelty could not be pleaded in bar of a divorce *a mensâ et toro* on the principle that it cannot justify the violation of the marriage bed;³ the Court may withhold from a petitioner guilty of such misconduct, a decree of dissolution of marriage, especially if it appear that the infidelity of the respondent has been brought about by such cruelty.

³ *Chambers v. Chambers*, 1 Consist. p. 452.

In *Pearman v. Pearman and Burgess*,⁴ however, the husband's petition on the ground of his wife's adultery, to which she alleged cruelty on his part, and both charges were proved; but it appeared that the husband's violence towards her had in no way contributed to her adultery, but had been provoked by her drunken habits: the Court dissolved the marriage.

Cruelty, then, as a bar to a suit for dissolution of marriage, must in general be such as has conduced to the respondent's adultery. A husband, who by his causeless ill-treatment of his wife drives her to seek protection from his violence in the arms of another man, has little reason to complain afterwards of her adultery.

Nor is the Court precluded from taking such cruelty into consideration by the fact that it has been condoned by continued cohabitation.⁵

The language used in this proviso is of great latitude, and opens a wide extent of inquiry for the discretion of the Court.⁶ Desertion, as a Desertion or wilful separation without reasonable excuse.

⁴ 1 S. & T. 601.

⁵ See the judgment of Sir C. Cresswell in *Goode v. Goode & Hamson*, 2 S. & T. pp. 257-8.

⁶ The following observations of Lord Penzance seem to apply equally to this as to the next and last discretionary bar:—

"The subject could not well have been otherwise treated. The shape or form that the petitioner's misconduct in married life may take, its degree, the length of its duration, its incidents of mitigation or aggravation, its causes and effects—all these have or may have a bearing on the petitioner's just claim to relief, and yet are capable of such infinite variety and

ground for divorce, has been fully explained under that head, but as a discretionary bar, it is not limited to any particular duration of time, and seems, when applied to the husband, to be equivalent to leaving the wife destitute; and if without excuse, is a strong reason for withholding a decree, inasmuch as it may have led to the adultery complained of.⁷

In *Yeatman v. Yeatman and Rummell*,⁸ the husband's petition for dissolution of marriage, the adultery of the respondent was proved; but as she had previously obtained a decree of judicial separation on the ground of his desertion, the Court dismissed his petition, observing that nothing is more likely to conduce to adultery than throwing a young wife on the world without the protection of her husband.

intensity, that they escape distinct expression, and refuse to be fixed in a positive and detailed enactment. The duty of weighing these matters has therefore been cast upon the Court. . . . But the same reasons which have served to make the Legislature express itself with latitude ought to make the Court cautious in restricting Itself by precedent. One main end of the Legislature in these provisions was this—that a wife should not first be the object of neglect and ill-treatment, and then the victim of the husband's own wrong." *Proctor v. Proctor & others*, 4 S. & T. p. 142.

⁷ Although desertion could not, in the Ecclesiastical Courts, be pleaded in bar of a divorce on the ground of adultery, the question was discussed in several cases whether *malicious desertion*, as it was termed, might not disentitle the petitioner to a decree. See *Reeves v. Reeves*, 2 Phill. 125; *Sullivan v. Sullivan*, 2 Add. 299; *Morgan v. Morgan*, 2 Curt. p. 688; *Clowes v. Clowes*, 4 N. of C. 1.

⁸ L. R. 2 P. & D. 187.

With respect to separation without reasonable excuse: the separation must have been wilful; the excuse, if any, unreasonable, to justify the Court in refusing a decree.⁹

The separation may have been involuntary as well as reasonable, as in the case of *Du Terreaux v. Du Terreaux*,¹ where the petitioner, when only in her seventeenth year, went out early one morning and was married, without the knowledge of her family, to the respondent by licence. She returned home the same morning and informed her mother of the marriage. Inquiries were made respecting her husband, and it being ascertained that he was not a suitable husband for her, she was sent to the Continent where she remained two or three years. Her husband made no attempt to cohabit with her, and subsequently committed bigamy. The Court being of opinion that the petitioner must from the circumstances of the case have been entrapped into the

⁹ As in *Coulthart v. Coulthart & Gouthwaite*, 28 L. J. 21, where the petitioner married a woman whom at the time he well knew to be a prostitute. Soon after the marriage, they went to stay at the house of the petitioner's father, whence, in a few weeks, they were obliged to remove in consequence of the wife showing bad temper, and making herself disagreeable to the family. A few days afterwards, the husband went to America, not on business, but because he lived unhappily with his wife, leaving her without any means and not supplying her with any during his absence of four years. In the meanwhile, the wife, after making herself very unpleasant to the husband's family, resumed her former way of life. The Court held that the separation had been wholly unjustifiable, and dismissed the petition.

¹ 1 S. & T. 555.

marriage, held that this was a reasonable excuse for the separation, and granted a decree.

The separation may have been wilful, though with reasonable excuse, as in *Haswell v. Haswell* and *Sanderson*,² where the petitioner found his wife submitting to indecent liberties from a man, and on that ground did not again return to her mother's house where she resided. She afterwards committed adultery with the co-respondent. It was held that the petitioner had good reason for separating from her, and was entitled to a decree.

Again, in *Proctor v. Proctor, Smith and Pitman*,³ the petitioner, being then dependent on his father, a clergyman, and having taken his degree at Cambridge, married in London in June, 1863, a woman who had been living as a prostitute in Cambridge. There was no cohabitation, and immediately after the marriage the respondent returned to Cambridge, where in the early part of 1864, she committed adultery. The petitioner's father having in the meantime discovered the marriage; in October, 1863, a deed of separation was executed, under which £1. a week was secured and paid to the respondent. The Court held that the position in which the petitioner was placed under his father and his want of means hardly left him an alternative, and that the separation, if wilful, might with good reason be excused.

Or, the separation may have been for some good purpose; for the mere absence of the husband will not justify the wife in committing adultery.

² 1 S. & T. 502.

³ 4 S. & T. 140; 34 L. J. 99.

In *Wilton v. Wilton and Chamberlain*,⁴ the petitioner, after an act of adultery by his wife, received her back, and then went to Australia to see what prospect there might be of settling there, leaving his wife for a time in a residence close to her own mother, where she again committed adultery. The Court held that the husband's absence was warranted, and dissolved the marriage.

Again, in *Davies v. Davies and Hughes*,⁵ the parties were in domestic service in the same family at Wolverhampton at the time of their marriage: the husband shortly after left the service, and in order to better himself, got a place in London, leaving his wife in the same service, where she soon began to show a partiality for his successor, the co-respondent, with whom she afterwards lived in open adultery. As there was nothing to show that the husband's absence was unreasonable, the Court made a decree in his favour.

But, on the other hand, the wife has a right to the comfort and support of her husband's society, the security of his home and name, and the first protection of his presence so far as his position and avocations will permit.

In *Jeffreys v. Jeffreys and Smith*,⁶ the husband, who was a butler in service, after cohabiting with his wife for about ten years—from 1844 to 1854—by frequently visiting her, left her altogether, though he continued to provide for her till about four or five years before filing his petition for dis-

⁴ 1 S. & T. 563.

⁵ 3 S. & T. 221; 32 L. J. 111.

⁶ 3 S. & T. 493; 33 L. J. 84.

solution of marriage on the ground of her adultery with the co-respondent, who had lodged in the same house with her. As it appeared that the petitioner had no good cause for withdrawing himself from his wife's society, and thus exposing her to temptation—for he had no reason to suspect her with Smith until some time after he had deserted her—the Court held that he had so far compromised himself as to forfeit his claim to a divorce.

What is
reasonable
excuse for
desertion.

The cause of, or excuse for "desertion" therefore—and these remarks apply to suits on that ground to which the respondent may plead "reasonable excuse"—must have been "reasonable;" not necessarily involving a distinct matrimonial offence on which a decree of separation or divorce could be founded; but it must be grave and weighty—mere frailty of temper and habits distasteful to a husband are not reasonable ground for depriving a wife of the protection of his home and society.⁷

Wilful
neglect or
misconduct
conducting to
adultery.

The considerations applicable to this proviso may be reduced under two heads; for there may have been neglect more or less wilful without actual misconduct. Such neglect or misconduct is neglect or misconduct in the marital capacity, and must be a breach of some marital duty towards the other party, and conducing in some way to the adultery complained of.

⁷ See *Haswell v. Haswell & Sanderson*, ante p. 168; *Yeatman v. Yeatman*, L. R. 1 P. & D. 489.

In *Cunnington v. Cunningham and Noble*,⁸ the petitioner, at the time of his marriage in 1849, was a clerk in the General Post Office, at a salary of £80. a year: his wife and he lived very happily till November in the following year, when he was apprehended on a charge of having feloniously opened a letter and taken a shilling from it; was tried, found guilty, and sentenced to ten years transportation. After being confined in several prisons, he was sent to the Convict establishment at Dartmoor. He had no means of making any provision for his wife, but during more than two years he kept up an affectionate correspondence with her by letter. Her family supplied her with the means of decent subsistence, and she led a very reputable life till 1853, when she formed a connexion with the co-respondent who lodged in the same house with her, by whom she had a child, and of which she informed her husband in 1855. On being discharged from prison he petitioned for a divorce. The Court held⁹ that although the adultery would probably never have happened but for the misconduct of the husband, for which he was prosecuted, it was not such misconduct as had conduced either directly or indirectly to the adultery, and that the petitioner was therefore entitled to a decree.

Again, in the case of *Beavan v. Beavan*,¹ the petitioner, an infant, married in November, 1860,

⁸ 1 S. & T. 475.

⁹ But with some doubt expressed by Pollock, C.B.

¹ 2 S. & T. 652; 32 L. J. 36.

a prostitute, several years older than himself: they lived together till December, when—the husband being a ward in Chancery—the parties were summoned before the Master of the Rolls, by whose order the husband was delivered to his guardian and sent abroad. The wife was interdicted from all intercourse or communication with him. She remained in the same lodgings in which she had cohabited with him till July, 1861, and there was no proof of any misconduct on her part while there. She applied to her husband's family for money, but received none; and subsequently committed adultery. It was held that the petitioner—whose suit was conducted by his guardian—was entitled to a decree; Sir C. Cresswell observing that "it would be a very bad example if this Court were to hold out that, whenever a prostitute inveigles a boy into marriage, his family is bound to maintain her."²

Further; the neglect or misconduct intended by the proviso is not constituted by mere carelessness on the part of a husband—the mere omission to do something which ought to have been done. Some men are very watchful and suspicious, others con-

² This case, however, seems to fall more properly under the preceding proviso, as one of separation, though not wilful. It is obvious that there may be neglect without separation, though there could hardly be "wilful" separation without neglect, unless on some justifiable ground.

In *Reeves v. Reeves*, 2 Phill. 125, the husband, a minor dependent on his father, had married a prostitute, but suspecting her of adultery left her. She having no means of support, resorted to prostitution: he was held entitled to his divorce.

fiding and unobservant; and therefore, before a husband can be found guilty of such neglect of, or misconduct towards his wife as has conduced to her adultery, there must be satisfactory evidence that he was aware that the intimacy between his wife and the adulterer was of such a character as to be distinctly dangerous; that he knew so much of it as to perceive the danger; and that he purposely or recklessly disregarded it and forbore to interfere. It is not necessary that a man should intend any wrong, but if he sees danger, and recklessly allows his wife to remain exposed to that danger, although without intending any wrong, he is guilty of neglect. It is for the public interest indeed, that a husband who has himself thrown his wife into temptation and exposed her to the addresses of other men should not be allowed to cast her aside after she has yielded to temptation.³

³ The husband is under an obligation to protect his wife from all associations which may expose her purity to hazard. Therefore if he introduces his wife to society so abandoned and exposes her to risks so great as to render a deviation from the paths of chastity a probable if not the necessary consequence, the Court would not wait for proof of actual connivance on the part of the husband but would hold him to the consequences of his own conduct when the adulterous connexion arose from the society and temptations to which he had introduced his wife; but the mere introduction of a wife to and allowing her to associate with a woman living in a state of concubinage, whose general conduct may be quite consistent with decorum, cannot affect the husband's right to a divorce on the ground of the wife's adultery wholly unconnected with such an acquaintance. See *Harris v. Harris*, 2 Hagg. pp. 376, 415, 511; *Graves v. Graves*, 3 Curt. 235.

In order, however, to justify the Court in withholding from a husband his remedy for his wife's adultery, it is not sufficient to show that some conduct on his part has conduced to any particular act of adultery after an adulterous intercourse has once been established, but it must be proved that he has so acted as to bring about that intercourse—that he has been guilty of such wilful neglect or misconduct as has conduced to the wife's first fall from virtue, and not merely of neglect conducing to any particular act of adultery subsequent to her fall.⁴

“It has been sometimes supposed that if a man chooses to marry an immodest woman he cannot afterwards free himself from her by reason of her unchastity. But whatever the previous life of a woman may have been, she binds herself by marriage to chastity, and if she break the conditions of marriage, her husband is entitled to claim its dissolution. But, on the other hand, a husband is at all times bound to accord to his wife the protection of his name, his home and his society, and certainly not the less so where the previous life of his wife renders her peculiarly accessible to temptation.⁵ No man is justified in turning his wife

⁴ See the judgments of Lord Penzance in *Dering v. Dering & Blakeley*, the Queen's Proctor and others intervening, L. R. 1 P. & D. 531; *St. Paul v. St. Paul & Farquhar*, the Queen's Proctor intervening, L. R. 1 P. & D. 739.

⁵ In *Dillon v. Dillon*, 3 Curt. 96, it was said that the circumstance that a man has married the woman that he has seduced can never operate as a justification for a wife's misconduct,

from his house without reasonable cause, and then claiming a divorce on account of the misconduct to which he has by so doing conduced.”

The foregoing observations of Lord Penzance arose from the case of *Baylis v. Baylis, Teevan and Cooper*,⁶ in which the petitioner having married a woman of loose character with whom he had previously cohabited, separated from her against her will shortly after the marriage, and sent her to live by herself in the chambers he had occupied when a bachelor, and where she soon afterwards committed adultery. There was no evidence of any reasonable cause for the separation; and the Court dismissed the petition, being of opinion that the husband's conduct had conduced to the wife's adultery.

Although this discretionary bar is by the statute applicable only to suits for dissolution of marriage, the Court will apply it in cases where the evidence would otherwise justify a sentence of judicial separation: as in *Boreham v. Boreham*;⁷ the wife's petition for dissolution of marriage on the grounds of adultery, cruelty, and desertion; and the Court found that the adultery only of the respondent was proved, and also that the petitioner had treated

nor excuse infidelity after marriage, nor bar the husband's redress; but, on the other hand, the husband is bound to exercise more than ordinary care that his wife does not deviate into the path of error into which he has been the first to lead her: his conduct therefore will be examined with more vigilant scrutiny than where no such connexion has existed.

⁶ L. R. 1 P. & D. 395.

⁷ L. R. 1 P. & D. 77.

the respondent with cruelty; had wilfully separated herself from him before his adultery; and that she had been guilty of such wilful neglect and misconduct as had conduced to his adultery. The Court refused to grant a decree of judicial separation on the ground of the husband's adultery, and dismissed the petition.⁸

Nor will the Court allow the prayer of the petition to be altered for the purpose of evading the proviso.

In *Lempriere v. Lempriere* and *Roebel*,⁹ the husband's suit for dissolution of marriage, it was established that the respondent was guilty of adultery, and the husband of cruelty and misconduct conducing to her adultery. It was then contended that though his petition thus failed under the provisions of the Divorce Act, he might convert it into a petition for judicial separation; and that then as his cruelty and misconduct would be no bar to his suit on account of his wife's adultery, he would be entitled

⁸ In *Hughes v. Hughes*, L. R. 1 P. & D. 219, the husband in answer to his wife's petition on the grounds of adultery and cruelty, denied both those charges; and further alleged that the petitioner had habitually treated him with insolence and neglect, and frequently absented herself from home, and refused to inform him where she had been, and constantly set his orders and wishes at defiance; and that she had withdrawn herself from cohabitation for two years without reasonable cause. The Court refused to order those allegations to be struck out, being of opinion that the respondent was entitled to give evidence of them for the purpose of showing that his misconduct, if any, had been caused by that of the petitioner.

⁹ L. R. 1 P. & D. 569.

to a decree. The Court refused to allow this to be done, and dismissed the petition.¹

Previously to the statute 29 Vict. c. 32, the ^{29 Vict.} Court had no power on a petition for dissolution of _{c. 32, s. 2.} marriage to make a substantive decree in favour of the respondent; and a double suit was always necessary whenever the respondent had not only grounds of defence but also for asking relief.

This difficulty has been partially removed by the 2nd section of that act, by which, in any suit instituted for dissolution of marriage, if the respondent shall oppose the relief sought on the ground, in case of such a suit instituted by a husband, of his adultery, cruelty or desertion, or in case of such a suit instituted by a wife, on the ground of her adultery or cruelty; the Court may in such suit give to the respondent on his or her application, the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief.²

¹ This would seem to do away with the doctrine of *compensatio criminis*, which prevailed in the Ecclesiastical Courts, and according to which, a petitioner's suit founded on adultery was not barred by a countercharge of cruelty.

The question is still open for discussion, but it is not difficult to anticipate the result.

² It has been held that a decree of restitution of conjugal rights is not the "relief" for desertion intended by the above section: therefore a wife who filed an answer to a petition for dissolution of marriage, wherein she denied the adultery charged and alleged desertion and wilful separation, was not allowed to add a prayer for restitution to the answer. *Drysdale v. Drysdale*, L. R. 1 P. & D. 365.

WIFE'S COSTS AFTER SUIT.

The wife's right to costs in a suit for dissolution of marriage or for judicial separation depends upon her success or failure as petitioner or respondent.³

When the wife is petitioner. When a decree is pronounced at the suit of the wife, she is not entitled to her costs as a matter of course; but the Court usually goes on to order that the respondent be condemned in costs, whether an order has or has not been made upon him to deposit a sum in the registry or to give security.⁴ And she may be entitled to surplus costs beyond the sum paid into the registry; but not if she fail in her suit.⁵

When the wife's petition is dismissed on the ground of its having been improperly instituted, the Court may in the full discretion which It possesses with respect to costs, refuse to make any order against the husband for their payment, though he may have deposited a sum in the registry for that purpose.⁶

³ By the 51st section of the Divorce Act, the Court on the hearing of any suit, proceeding or petition under this Act may make such order as to costs as to such Court may seem just. And see Rule 159 in Appendix.

⁴ See ante, pp. 14, 15.

⁵ *Chetwynd v. Chetwynd*, 4 S. & T. 108; 34 L. J. 65; *Sopwith v. Sopwith*, 2 S. & T. 105.

⁶ *Heal v. Heal*, L. B. 1 P. & D. 300, where the wife's suit for judicial separation on the ground of cruelty was dismissed; and as she had a separate income larger than that of her

When the wife fails in her defence, she is not entitled to costs beyond the sum paid or secured;⁷ and if her answer contains charges against her husband which at the trial turn out to have been made without any foundation, the costs occasioned by such charges will be disallowed.⁸ If she establishes a defence to her husband's petition, she may, though found guilty, be entitled to costs;⁹ and where the husband's petition was dismissed and the wife's costs exceeded the sum paid into the registry, she was held entitled to the balance.¹ Where cross suits were instituted, and the wife was found guilty of adultery, the husband was

When she
is respon-
dent.

husband, and the Court was of opinion that the suit had been improperly instituted, an order for the payment of her costs of the hearing was refused.

In *Ditchfield v. Ditchfield*, L. R. 1 P. & D. 729, the wife's suit for nullity having failed, and the husband having paid her costs of that suit to the extent of the amount deposited in the registry,* she subsequently petitioned for dissolution on the grounds of adultery and cruelty, and obtained a decree. The Court condemned the husband in the costs of the second suit, but allowed him to deduct therefrom the amount of the costs he had paid in the suit for nullity.

In *Jones v. Jones*, L. R. 2 P. & D. 333, the full Court affirmed the decision of the Judge Ordinary refusing to order the husband to pay the wife's costs, her petition charging him with incestuous adultery having been dismissed as groundless.

⁷ *Glennie v. Glennie & Bowles*, 3 S. & T. 109.

⁸ *Clark v. Clark & others*, 4 S. & T. 111; 34 L. J. 71.

⁹ *Ellyatt v. Ellyatt & others*, 3 S. & T. 503.

¹ *Cooke v. Cooke & Allen*, 3 S. & T. 603; 34 L. J. 15.

* See *T. v. D.* L. R. 1 P. & D. 127, and post, pp. 192-3.

held not liable to pay the wife's costs in her suit, she not having had them taxed before the hearing.²

It has always been held that after a wife has been found guilty of adultery, it is too late for her to tax her costs against her husband;³ but she may be entitled to enforce any order already obtained.⁴

The procedure with respect to the wife's costs when the decision of the Court or the jury is against her, is now regulated by Rule 159. The Court may however dispense with that rule, and entertain an application for the wife's costs subsequently to the hearing in a meritorious case.⁵

² *Rolt v. Rolt*, 3 S. & T. 604; 34 L. J. 51.

³ *Keats v. Keats & Montezuma*, 1 S. & T. p. 358.

⁴ In *Whitmore v. Whitmore*, L. R. 1 P. & D. 96, the wife having obtained a decree *nisi* with costs against the respondent, the Queen's Proctor intervened, and proved her adultery pending the suit. She was held entitled to enforce the payment by the respondent of all costs which had been taxed, and ordered to be paid up to the date when she was found guilty of adultery, including the costs of the hearing, though they had not been taxed.

⁵ See *Conradi v. Conradi & Flashman*, L. R. 1 P. & D. 163; *Somerville v. Somerville & Webb*, 36 L. J. 87.

CHAPTER IV.

Of Suits for Decrees of Nullity of Marriage—Impotency or Malformation — Grounds of Nullity under the Marriage Acts : Banns ; Licence ; Due notice to Registrar —Insanity —Consanguinity or Affinity—Prior Marriage—Defences in Suits of Nullity—Costs.

A SUIT for a declaration of nullity of marriage The five grounds of suits.—that is, for a decree that the marriage which is the subject of the suit, though solemnized in fact, was null and void in law—may be brought: first, on the ground of incurable impotency or malformation of the parts of generation of either party; secondly, by reason of the marriage having been had without due publication of banns, or licence; thirdly, on the ground of either party having been incapable of entering into the marriage contract by reason of insanity at the time of marriage; fourthly, by reason of the married persons being within the prohibited degrees of consanguinity or affinity; and fifthly, on the ground that either party was at the time of marriage legally married to another.

There is this clear distinction between the first Distinction between the first and other grounds. named and the other grounds for annulling a marriage—that impotency or malformation does not of itself invalidate a marriage legally contracted—it is not void *ab initio* by reason of sexual incapacity, but only voidable, that is, liable to be impugned

on proof of such incapacity during the lifetime of both parties.¹ The reason of this is expressed in the maxim : *consensus non concubitus facit matrimonium* : it is the consent to enter into a binding contract, and not the matrimonial copulation, which constitutes the marriage. To put this as plainly as possible : suppose a woman on her wedding night were to discover that her husband was an eunuch, she would not be justified in leaving him and marrying another man ; for by doing so, she would incur the penalties of bigamy.

On the other hand, in the four latter grounds of nullity, the marriages so solemnized are mere ceremonies, and are by the legal or statutable disabilities to contract them, absolutely null and void to all intents and purposes.

IMPOTENCY OR MALFORMATION.

General
requisites.

Capacity to perform the duties of marriage is so far essential to its validity, that as incapacity for sexual intercourse is necessarily attended with serious mischiefs to the parties as it prevents their fulfilling the principal purposes of marriage—the procreation of children and the lawful enjoyment of each other's person—impotency or malformation in either party is a good ground for annulling the marriage.²

¹ *A. v. B.* L. R. 1 P. & D. 559 : s. c. as *P. v. S.* 37 L. J. 80.

² The distinction between the suit by the man and by the woman being that though she may be so malformed as to be impenetrable, and therefore unfit for sexual intercourse, she

The cases have not been numerous, partly because, it may be presumed, real defects of this nature are not very common in men and much more uncommon in women;³ and because, where they do exist, persons are either discreet enough to abstain from marriage entirely, or where a marriage has been contracted in ignorance of the defect, many reasons may operate to prevent the parties from making a public disclosure. There is, however, obviously, more excuse for a woman marrying under such circumstances, as she is not supposed, until married, to have the means of knowing the existence in herself of any physical impediment to matrimony.⁴

The suit must be brought from sincere motives, without delay, and under circumstances in which the consequences may be supposed to inflict a real injury and disappointment on the party com-

cannot strictly be impotent, whereas the gist of the complaint against the man is that *non potest penem erigere, nec feminam penetrare et cognoscere*.

³ Of the cases herein referred to, 17 were suits by women; 9 by men.

Some confusion is apt to arise in citing the cases by reason of different initial letters being used in different reports of the same cases. In those instances, I have referred to both reports.

⁴ Although a man, therefore, cannot petition on the ground of his own impotency, on the principle that no man shall take advantage of his own wrong; a woman might sue on account of being herself unfit for sexual intercourse. See *Norton v. Seton*, 3 Phill. 147, and the opinion of Sir Wm. Wynne, p. 149; *in notis*.

plaining.⁵ When, therefore, a person is really aggrieved on account of these consequences, the law affords a remedy according to the circumstances of the case. In the case of the husband, he is at liberty to resort to the Court as soon as he discovers that his wife, from malformation, is incapable of sexual intercourse. In the case of the woman being the complainant, she has the same remedy in a similar case, but if the incapacity of the man be *propter frigiditatem*, the law may require, before her suit be commenced, a sufficient cohabitation to establish the fact, and hence the rule, presently to be explained, of three years' cohabitation.

In all cases, however, there are two distinct questions: first, whether the marriage has in fact been consummated; and, if not, then whether such non-consummation is due to the impotency or malformation of the party charged.⁶ The principal means of proof are: medical inspection of the parties, and medical testimony as to the conclusions to be drawn from such inspection. In practice, an order—formerly called a monition—is usually issued directing the respondent to submit to per-

⁵ But what will constitute insincerity is not easy to define: it must be a combination of circumstances which show that the alleged grievance was not the motive which led to the commencement of the suit; though what would constitute such a case cannot be defined beforehand. *Anonymous*, Deane, p. 300.

⁶ For the ground of the Court's interference is that there is a practical impossibility that the marriage can ever be consummated. *G. v. G.*, L. R. 2 P. & D. 287.

sonal medical inspection; and two or more medical men are appointed by agreement between the parties, subject to the approval of the Court,⁷ to inspect, when necessary, the persons of the petitioner and the respondent, and make their report accordingly; but whether the inspectors are so appointed or not, the Court is not bound by their report only, and evidence explanatory of it may be given, and they as well as other medical men may be examined.

The parties to the suit are also competent witnesses, and their evidence often much facilitates the investigation of the truth of the case.

First: of the woman's suit as the more usual. Requisites of the woman's suit. When the woman is the complainant, the requisites to sustain her suit are: that the man was at the time of the marriage, and is incurably impotent; and that she is *virgo intacta, apta viro*—in other words, that no consummation has taken place, and that she is fit for connubial intercourse.⁸ The

⁷ When, in a suit by the woman, the respondent does not appear to the citation, and there is therefore no defence, the inspectors of the petitioner's person are appointed by one of the registrars.

⁸ The refusal of the man to undergo inspection, coupled with his admission of his incapacity, must be taken strongly against him. In *Pollard v. Wybourn*, 1 Hagg. 725, the man was forty-one and the woman seventeen years of age at the time of marriage, and they cohabited at intervals for about eleven years, when the man quitted the country. They had for some time before ceased to occupy the same bed in consequence of her health having suffered. The certificate of two medical men that she was *virgo intacta et apta viro* coupled with his confessions to them of his incapacity, though he had

well-known fact that, in the generality of such cases, the health of the woman cannot escape serious injury is also to be considered.

Rule
requiring
three
years'
cohabita-
tion.

Non-consummation is evidence of impotency by reason that according to the ordinary course of nature consummation does take place when persons both competent cohabit together. When, therefore, after such cohabitation, a woman is proved to be a virgin capable of consummation, the absence of consummation must necessarily be attributed to the apparent or undiscoverable impotence of the man. With this view, a rule was adopted in the Ecclesiastical Courts requiring when there was no evidence of the man's apparent impotence, proof of virginity after three years' cohabitation.⁹ The object of this rule was that sufficient time might be afforded for ascertaining the true condition of the person complained of—that is, that there should

not given in any answer and had refused to undergo examination, were held sufficient.

⁹ The duration of three years means not the lapse of time only, but continued facility for consummation, which must differ in many cases, for it rarely happens that married persons sleep together constantly in the same bed for three years. The Court therefore does not merely look to the length of time that the marriage has subsisted, but to the actual cohabitation and consequent facility for consummation. *N. v. M.* 2 Roberts. p. 637: s. c. as *A. v. B.* 1 Eccl. & Adm. 12.

In *Welde v. Welde*, 2 Lee, 578, it appeared that though the parties had been married three years, the cohabitation had not been continuous, but they had been a great part of that time absent from one another, and the evidence of the medical inspectors did not prove that the man was absolutely and naturally incapable.

be a cohabitation of so long an endurance that if the man were potent and in health, no temporary impediment could have prevented consummation according to all the reasoning and experience of which the subject admits.¹

It was not, however, considered an absolutely binding rule, and might under circumstances be dispensed with; as, when the marriage after a cohabitation of sufficient length to overcome any temporary impediments had clearly not been consummated, and when by the admissions or acts of the party charged, his refusal to submit to inspection, or other independent circumstances, the Court was satisfied beyond a doubt of the incurable impotence alleged.²

In *U. v. F.*,³ the marriage took place in July,

¹ Temporary impediment is understood to mean nervous feeling on the part of the man, or resistance from fear on the part of the woman. *N. v. M.* 2 Roberts. p. 636.

² *Greenstreet v. Cumyns*, 2 Phill. 10, where the parties were married in July, 1807, and the suit was instituted in 1809. The man admitted both in his answer and to the medical inspectors, that he was incapable at the time of marriage and had continued so ever since.

In *Sparrow v. Harrison*, 3 Curt. 16; on appeal to the Privy Council, 4 Moo. P. C. C. 96, the man's confession of non-consummation, and his refusal to undergo inspection, were held sufficient proof, there being no reason to suspect collusion between the parties. But in *Scott v. Jones*, 2 N. of C. 36, where the cohabitation had continued little more than three weeks, and the medical evidence established that the woman was a virgin and apt, and that there was no apparent defect in the man, the suit was dismissed.

³ 2 Roberts. 614.

1849, at which time the woman was twenty-three and the man twenty-five years of age. They cohabited at various places till towards the end of May, 1852, when the man went to Paris, having directed his wife not to follow him, and from which place he wrote to her indirectly admitting his impotency. The citation and the monition in the suit were served upon him there, but he refused to submit to inspection. The medical evidence with respect to the woman was that "no sexual intercourse had ever been properly effected; and that there was no impediment to perfect sexual intercourse on her part." The decree of nullity was pronounced.

In *A. v. B.*⁴ the man was about forty-five and the woman about thirty at the time of marriage, and after a cohabitation of two years and some months they separated. The report of the medical inspectors was to the effect "that there is apparent capacity, or rather no apparent incapacity" in the man: "that from his failure to accomplish sexual intercourse during a long period of cohabitation, we believe the said *B.* to be impotent as regards the said *A.*, and that such impotency cannot be removed by art or skill." The Court pronounced for the nullity, holding that the general rule re-

⁴ 1 Eccl. & Adm. 12: s. c. as *N. v. M.* 2 Roberts. 625. With respect to impotency *quoad hanc*, see the *Case of the Countess of Essex*, State Trials, vol. ii. pp. 785, 805.

It is obvious that impotency, *quoad hanc*, as it is termed is equally a grievance and quite as prejudicial to the individual woman as if the man were impotent in respect to all women.

quiring three years cohabitation is not absolutely necessary when there has been an actual cohabitation sufficiently long to overcome, were the man potent, any temporary impediment to consummation.

In *G. v. T.*⁵ the parties separated after a cohabitation of only three months. The certificate of the inspectors as to the wife was to the effect that though there were no certain signs of virginity which could be relied on, yet that there was no evidence of perfect connexion having ever taken place. As to the husband:—"We find no anatomical malformation, but from oral information obtained during a somewhat lengthened interview, we are decidedly of opinion that there is some physiological defect which has prevented him from completing the act of copulation. As we cannot discover any special cause to which a remedy can be applied, we fear this defect will be permanent." At the hearing, no opposition was offered, and Dr. Lushington pronounced for the nullity, and observed that he could not think of sending the lady back to renew cohabitation, though he could have wished that it had been more distinctly stated that her health had suffered and was liable to suffer by such cohabitation.

Now, however, that the parties are admitted to tell their own tale, the rule that impotence is to be presumed after three years of ineffectual cohabitation and not before, may according to their evidence, be more easily applied or dispensed with.

⁵ 1 Eccl. & Adm. 389.

In *M. v. H.*⁶ it appeared from the medical certificate and the evidence of the petitioner, that she was a virgin and without defect; that the husband had no visible defect either,—on the contrary, had every outward sign of perfect health and vigour; and that the parties had cohabited two years and ten months, and during the greater part of that time occupied the same bed: the wife stated that he had often attempted consummation, but without effect, and denied any unwillingness on her part. The husband's evidence was that he had desisted from enforcing his marital rights by reason of the marked repugnance of his wife; and that the non-consummation of the marriage was due only to consideration for her, and forbearance on his part.

Under these circumstances, the Court suspended its decree, recommending that the petitioner should return to cohabitation for a time; and subsequently, on affidavits that she had done so, and that after sleeping with her husband for about a month, the marriage had remained unconsummated, pronounced a decree of nullity—the husband not further opposing.⁷

⁶ 3 S. & T. 517, 592.

⁷ In *S. v. E.* 3 S. & T. 240: s. c. as *Stagg v. Edgcombe*, 32 L. J. 153, the cohabitation had continued little more than two months, and the report of the medical inspectors disproved impotency from disease or natural infirmity; but ascribed the non-consummation of the marriage to temporary incapacity occasioned by a long-continued habit of excessive self-abuse—masturbation*—which, as they explained in their *vidé voce*

* Masturbo=χειρουργέω. It has also been termed Onanism. See Genesis, xxxviii. 9.

In *F. v. D.*^s the husband had been personally served with the petition and with the order of the Court to submit to medical inspection, but he neither appeared nor obeyed the order. The report of the medical inspectors as to the condition of the petitioner was "that there is no malformation nor impediment on her part to prevent the act of generation, but we cannot determine whether she is a virgin."

The evidence of the petitioner, by leave of the Court given on affidavit, detailed her cohabitation with the respondent, and his constantly repeated but ineffectual attempts to consummate the marriage during a period of about seventeen months, at the end of which time, broken in health, she left him and returned to her father. The Judge Ordinary held the non-consummation and the impotence proved; and with respect to the rule of three years cohabitation, observed: "this rule only applies when the impotence is left to be presumed from continued non-consummation; for when the impotence is clearly proved *aliunde*, the Court has

evidence might possibly, but not probably, be cured by moral self-restraint. No formal report was made as to the state of the petitioner, but she deposed that the respondent had twice attempted without success to consummate the marriage, and the evidence of the medical men who had examined her was equivocal as to her condition. The Court held that it had no right to assume that the incapacity would be permanent, and dismissed the petition.

This is, happily, the only *reported* case of the kind.

^s 4 S. & T. 86; s. c. as *D. v. F.* 34 L. J. 66.

never resorted to it. The present case falls rather within the latter class; for if I may rely on the petitioner's oath, the impotence is beyond a doubt; and if I cannot rely upon her oath, I shall have no better ground for doing so by putting her to repeat the same story at the end of another eighteen months' cohabitation."

The evidence ought to be unequivocal as to the condition of the woman and the incurable impotence of the man. The Court is very reluctant to act upon the unsupported statements of the petitioner; and will only do so when there is not the least reason to doubt the truth and *bona fides* of the case. If there is a direct conflict of testimony between the two parties who alone know the truth, the difficulty of deciding between them is much increased.

In *T. v. D.*⁹ the petitioner was about thirty and the respondent about thirty-five years of age at the time of their marriage in 1854. They cohabited without any complaint on the part of the petitioner till 1863, when they separated on account of the respondent's ill-treatment of her. The medical inspectors certified as to the petitioner that "the usual sign of virginity, the presence of a hymen, is absent, and we do not find anything that would be an impediment to the due performance of sexual intercourse;" and as to the respondent, that in their opinion he was quite capable of

⁹ L. R. 1 P. & D. 127: s. c. as *Tavernor v. Ditchfield*, 35 L. J. 51.

performing the act of generation. At the hearing other medical men were examined in support of the petition, but they neither corroborated nor contradicted the statement of the petitioner that the marriage had never been consummated. The respondent had denied his impotence, but did not appear at the hearing.

The Judge Ordinary, in dismissing the petition, said: "Eight years cohabitation without complaint, and at the end of it a separation enforced by the husband, justify a vigilant suspicion as to the sincerity of the suit. The strong motive that exists on both sides to break a tie that had become burthensome to both, makes it difficult to obtain a true account from either. The husband stands by. It is said he is hostile, but he is hostile to his wife, not to the suit, and the wife's personal account is the sole testimony which the Court has for its guidance. It derives no support from any single circumstance in the case, nor from the physical appearances to which the medical witnesses speak. The result is that the charge is not made out to the satisfaction of the Court."¹

Again, in *U. v. J.*² the petitioner during two years and some months cohabitation made no complaint, and the separation appeared to have been caused by the violence of the respondent. The only evidence of the alleged impotence was that of

¹ The Court ordered that the wife's costs of the hearing should be paid by the husband to the extent of the security deposited by him in the registry. See Rule 159.

² L. R. 1 P. & D. 460.

the petitioner, which was contradicted by the respondent. The medical evidence respecting the petitioner was that no opinion could be formed "whether for two years she had had ordinary and regular connexion with her husband or not," and that "it might have been the case" consistently with what was seen. The Court dismissed the petition.

Effect of
delay.

Lapse of time between the marriage and the institution of the suit is not in itself a bar, for it may be explained or accounted for; but as it tends to throw obscurity over the circumstances of the case, and to render doubtful that evidence upon which, if brought forward at an earlier period, full reliance might have been placed; it follows that after great lapse of time the clearest and most unequivocal evidence of the facts will be required.

The complainant therefore, whether man or woman—for the same principle, with some modification is to be applied to both—should proceed without marked delay, for if the alleged grievance is borne with for a long time, the presumption is that the petitioner is seeking relief not under the real pressure of the grievance on which the suit is founded, but for some side purpose.

Lapse of time coupled with an indirect motive may be considered an absolute bar.

In *H. v. C.*,⁸ the first case in which delay on the part of a woman was considered, the parties were married in 1834. On the morning after the mar-

⁸ 1 S. & T. 605; 29 L. J. 81: on appeal to the House of Lords, 31 L. J. 103.

riage, the man exclaimed on entering the breakfast room, "My poor virgin wife!"

About ten months afterwards the wife reproached her husband with his want of confidence in not telling her that he was unable to consummate the marriage. He said he was not able to perform the part of a husband, and subsequently consulted a medical man, as did also the wife. They continued to live amicably together till 1838, but without any change in the husband's condition. Her father and mother then spoke to him on the subject, upon which he left the house and refused to live with her again. From that time till 1854, she maintained herself by her own exertions, but frequently importuned her husband to take her back to live with him. In that year, however, she being ill, was unable to maintain herself, and caused him to be sued as her husband for debts incurred by her; the result of these proceedings was that he made her an allowance which was continued till 1858, when he wrote to her, saying that it must be reduced, and she soon after filed her petition for nullity. The only evidence as to her condition, beyond her own testimony, was that of a medical man, who had attended her some ten years before for a uterine disorder, and who certified that from the examination he then made he inferred that the marriage had not been consummated; and that there was no imperfection on her part which would render consummation impossible. The cause was heard before the full Court, and Sir C. Cresswell, in giving the judgment of himself and

Williams, J., said:—"Considering the length of time that has elapsed since the marriage and since the separation, the knowledge which the petitioner then had of her husband's imperfection, her request repeated continually for sixteen years afterwards to be received back by him, her arrangements with creditors to sue him as her husband for debts contracted by her,⁴ her negotiation for, and the receipt of an allowance for several years, and the institution of this suit on an intimation that the allowance would be reduced; considering also the imperfect nature of the medical evidence adduced, and that much more precise and certain testimony might have been had if the suit had been commenced within a reasonable period, I am of opinion that the petitioner is not entitled to a decree."⁵

Again, in *M. v. B.*⁶ the petitioner was married to the respondent in 1853, and slept with him for about two years, when at his request she occupied a separate bed, but continued to live in his house until 1863, when she left him in consequence of a

⁴ Bramwell, B., who dissented from the judgment generally, observed upon this part of the case: "Nor do I think it of any moment that she allowed him to be sued for debts contracted by her. It is said to be an admission by her; that is assuming her to have a considerable knowledge of the common law and the law ecclesiastical; but I doubt if it is anything but an admission of the truth—viz. that he was her husband *de facto*."

⁵ Affirmed on appeal to the House of Lords, as *Castleden v. Castleden*, 9 H. of L. cas. 186.

⁶ 3 S. & T. 550.

dispute about a servant-boy whom he insisted upon having constantly with him in the drawing-room in the evenings. According to her evidence, the respondent had made only one unsuccessful attempt to consummate the marriage on the wedding night, and the certificate of the medical inspectors showed that she was a virgin, and fit for intercourse. The respondent did not appear nor submit himself for medical inspection. It further appeared that the suit was not thought of for some months after she had left her husband, and was then instituted by reason of reports which were circulated that she was obliged to leave her home because she was mad. Under these circumstances, the Court dismissed her petition.

In *L. v. H.*⁷ the parties cohabited from the date of their marriage in November 1848—the man being then about thirty and the woman about twenty-two years of age—till July 1862 : the woman then occupied a separate bed for a few weeks in consequence of disputes about other matters, and, in August, finally left the house. In 1864 she petitioned for a decree of nullity. The report of the medical inspectors was in effect that the woman was a virgin, and that there was no impediment on her part to prevent consummation; and that there was no malformation in the man, nor any appearance indicating a want of capacity. At the hearing the testimony of the parties with respect to consummation was directly contradictory. Evidence was also given by the inspectors

⁷ 4 S. & T. 115; s. c. as *X. v. Y.* 34 L. J. 81.

and by other medical men. In the result the Court came to the conclusion that the marriage had never been completely consummated; but that it was not proved that there was any impotency on the part of the man; that the separation had not been due to any distress felt by the petitioner on account of her husband's supposed defects; that in that case her delay would have been a bar; and dismissed him from the suit.

On appeal,⁸ the House of Lords reversed this decision, and pronounced the marriage null and void;⁹ and with respect to the objection on the ground of delay, Lord Chelmsford in his judgment said: "It seems at first sight extraordinary that any length of time should operate as a bar to a proceeding for the nullity of a marriage. The usual maxim of law is *quod ab initio non valet, in tractu temporis non convalescit*, but it seems that in cases of this description, delay in instituting the suit, not satisfactorily explained, is taken as a personal exception to the petitioner."

⁸ This case, like many others of the same kind, can be properly estimated only by reading and comparing the evidence and the two judgments in full.

⁹ *Lewis v. Hayward*, 35 L. J. H. of L. 105. The House declined to make any order as to costs; and subsequently, on an application to the Judge Ordinary with respect to costs, he held that under the circumstances, he had no power to make any order: and also directed that a copy of the decree made by the House of Lords should be recorded on the files of the Court upon a copy of such decree, verified by affidavit, being deposited in the Registry. *L. v. H.* L. R. 1 P. & D. 93.

Where the husband is the complainant on the ground of his wife's unfitness, the rule requiring three years' cohabitation does not apply, and it is only necessary to establish by medical testimony the incurable malformation of her person. Delay, therefore, on his part, in instituting the suit—especially if coupled with other facts showing insincerity—will, if unexplained, be the more strongly pressed against him, for he ought, in justice to the woman, immediately on discovering her unfitness for sexual intercourse, to proceed to ascertain whether the defect is curable or not, and act accordingly.¹

In *Guest v. Guest*²—though the suit was dismissed mainly on other grounds, it appearing that there were pecuniary motives for instituting it—Lord Stowell observed: “The length of time which has elapsed is, in itself, almost a bar. . . . That a period of seven years should be allowed to elapse in a case where even a very short cohabitation would have sufficed for the discovery, is not allowed by any principle of law with which I am acquainted.” And in *Briggs v. Morgan*,³ a delay of sixteen months was considered to be “not easily accounted for, in a case in which the proof of continued cohabitation is not required; for in a case of actual malformation no such proof is required.”

¹ When, however, the delay can be satisfactorily accounted for; as in *E. v. T.* 3 S. & T. 312, where the man abstained for ten years from instituting his suit by reason of the woman's nervous and delicate condition; it ceases to be a bar.

² 2 Consist. p. 323.

³ 2 Consist. p. 330.

Dr. Lushington's observations in *B. v. B.*⁴ are very strong on this point: "As relates to the right of the husband to prosecute a suit of this description, time, with other facts, deserves great consideration. The law affords a remedy to those who are really aggrieved and sensible of the grievance, and then only *vigilantibus non dormientibus*. The remedy is given on account of the loss sustained and the evil felt, not to promote or assist other purposes having no relation to it. If the husband is silent for so long a period, unaccounted for, that the presumption would necessarily arise that he acquiesced in the consequences which such an unfortunate connexion entailed upon him, he could hardly be entitled to say, 'Give me a remedy for a grievance I have not felt,' and that to the detriment of another."

In this case, the effect of the medical evidence was that there existed a malformation which was incurable, and that it was impossible that the woman could become a mother, but that sexual intercourse, limited in some particulars, was not only practicable but had actually taken place; and two of the medical witnesses deposed that she was not a virgin. In this state of things, the Court, looking at all the circumstances of the case—the great lapse of time, about eighteen years, between the marriage and the institution of the suit, and the fact that it appeared to be instituted from other motives, incompatibility of temper—came to the

⁴ 1 Eccl. & Adm. p. 260; 2 Roberts. 580.

conclusion that the petitioner was not entitled to a decree.

To sustain the man's suit, the woman must be *viro inutilis*, and though barrenness—the mere incapability of conception—is not sufficient ground whereon to found a decree of nullity; yet if she be so incurably malformed as to be unfit for *proper* sexual intercourse, the man is entitled to a decree, for if the intercourse be so imperfect as to be scarcely natural, it is, legally speaking, no intercourse at all, inasmuch as it fails to attain one of the principal ends of matrimony—the protection against illicit intercourse by the lawful indulgence of the passions.

The
requisites
to sustain
the suit.

In the singular case of *D. v. A.*⁵ the parties were, when married, of the respective ages of twenty-six and twenty-five years, and cohabited for nearly two years before the commencement of the suit. The medical evidence showed that the woman was so malformed as to be irremediably incapable of procreation or conception, though there might be connexion of a very imperfect character, owing to the peculiar and unnatural formation of the vagina; it being an impervious *cul de sac*, incapable of elongation, and admitting only a very partial insertion of the penis. The marriage was annulled.

The ages of the parties at the time of marriage are also to be considered, for although there is no legal limit to the age at which the right to complain ceases, and few men may be found willing to

The ages
of the
parties to
be con-
sidered.

⁵ 1 Roberts. 279.

agree with the *dictum* of Sir J. Nicholl, that a man of sixty who marries a woman of fifty-two should be content to take her *tanquam soror*,⁶ yet a man who marries a woman of advanced age ought to take the consequences with her.⁷ In *Briggs v. Morgan*, already referred to, the man was forty-two years of age at the time of marriage, the woman being then fifty and a widow.⁸ Lord Stowell took into consideration the respective ages of the parties, and held that he was not justified in exposing a woman of that age to the only proof by which the alleged defect could be satisfactorily established. For this reason, and from circumstances showing delay and insincerity on the part of the complainant, the woman was dismissed from the suit.

In *W. v. H.*⁹ the parties were of the respective ages of fifty-four and forty-nine, and the result of the medical evidence was that the obstruction was

⁶ In *Brown v. Brown*, 1 Hagg. 523, the wife's suit on the grounds of cruelty and adultery, in answer to which the man alleged her malformation, which was not however proved to be incurable.

⁷ Although it is obvious that different considerations must apply to persons of advanced age and to those of an earlier period of life ; no limit has been assigned, either legally or medically, to the *possibility* of sexual intercourse. See Taylor's Med. Jurisp. Chapters 66, 67, edit. 1865.

⁸ An objection having been taken, that the woman had long been the wife of another man, Lord Stowell observed : " It cannot be contended to be an estoppel of one man's complaint that another did not complain who might have had the same cause of complaint, but which for private reasons affecting his own discretion he did not think proper to bring forward."

2 Consist. p. 327.

⁹ 2 S. & T. 240.

congenital, and that it might possibly be removed by a surgical operation; that such an operation would, the woman being forty-nine years of age, be attended with considerable danger to her life; and the success of it, with regard to the result to be obtained, doubtful. The Court held that, under these circumstances, the petitioner could not be expected to call upon the respondent to undergo an operation; that the malformation was to be considered as congenital and permanent, and pronounced a decree of nullity.

In *G. v. G.*¹ the parties had been married and had cohabited for about two years and ten months, and the woman refused to allow her husband, who was perfectly competent, to consummate the marriage. The medical evidence was that, though there was no malformation or structural defect in her, she was suffering from excessive sensibility; that there were means by which her condition might be remedied, but in order that they should succeed, it was necessary that she should lend herself to them; but that if she refused to do so, the marriage could never be consummated. The Court, being satisfied that consummation was practically impossible, annulled the marriage.

There is this further distinction between the suit by the woman and by the man; that whereas the man's confession of impotency and refusal to undergo inspection are strong evidence against him, the malformation of the woman must be

¹ L. R. 2 P. & D. 287.

proved, and much difficulty may be caused by her evading or refusing to undergo medical inspection.

In *T. v. M.*² the respondent had not been personally served with the petition and citation—substituted service having been allowed by order of the Court on her brother—and had never submitted to a medical examination, and could not be found, but was supposed to be abroad. At the hearing, the evidence of the petitioner, and of the medical men who had attended the respondent but had never examined her person, did not satisfy the Court that she was the subject of incurable malformation. The Court suspended Its decree in order to give the petitioner an opportunity of having her examined, if she should come within the jurisdiction.³

MARRIAGE WITHOUT DUE PUBLICATION OF BANNES,
OR LICENCE.⁴

By the 22nd section of 4 Geo. IV. c. 76, it is

² L. R. 1 P. & D. 31.

³ In *B. v. L.* L. R. 1 P. & D. 639, the Court made the usual order for the medical inspection of the respondent's person; and that the respondent and the inspectors should attend before one of the registrars of the Court at such time and place as he might appoint in order that the respondent might be identified as the party in the cause, and the inspectors be duly sworn. This order was duly served upon her, but she refused to submit to any such inspection. On motion for an attachment against her, the Court directed that it should stand over until the hearing, intimating that if she attempted to leave the jurisdiction it should be granted at once.

⁴ Under Lord Hardwicke's Act, 26 Geo. II. c. 33, s. 8, a

enacted that if any person shall knowingly and wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published, unless by special licence, or shall knowingly and wilfully intermarry without due publication of banns, or licence from a person or persons having authority to grant the same, first had and obtained, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in Holy Orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever.⁵

This provision must be considered under two heads: banns and licences.

First, with respect to banns: there must have Banns.

marriage was void when had "without publication of banns," and it was constantly held that a publication in false names was no publication; but in that act, there was no provision for the protection of innocent parties, and in many cases the Courts were obliged to annul the marriage where one of the parties had been guilty of fraud, without its being possible to do justice to the other party not cognizant of the fraud, and it was to remedy this inconvenience that the section of the present marriage act, as set out in the text, was passed.

⁵ Inasmuch as the marriage contract differs from all other contracts in this: that it alters the personal status of the parties; the Courts, both Common Law and Ecclesiastical, have always regarded with jealous suspicion suits founded on the mere informality of the ceremony.

For some decisions under the first marriage Act, see *Rex v. The Inhabitants of Billingshurst*, 3 M. & S. 250, and the cases in the note thereto; *Rex v. The Inhabitants of Tibshelf*, 1 B. & Ad. 190, and Lord Tenterden's judgment, p. 195; and under the present Act, *Rex v. The Inhabitants of Wroxtton*, 4 B. & Ad. 640.

been such an error in the description of one or both of the parties either by suppressing or adding a christian name or altering a surname as would mislead those interested in the marriage; for if the publication is such as not to designate but to conceal the parties, it is no publication. But it must be shown that both parties were cognizant of and participated in the fraud: the act of one will not operate to the prejudice of the other.

By whom
instituted.

Suits of this description have usually been instituted by a parent to annul the clandestine marriage of a minor; but the minor may petition through his father as guardian; or, the suit may be brought by either of the parties, when of age.⁶

⁶ In *Sherwood v. Ray*, 1 Moo. P. C. C. 353, the possibility of the father becoming liable to maintain his grandchildren under 43 Eliz. c. 2, s. 7,* in the event of the death or inability of the parents, was held to give him a sufficient pecuniary interest in his daughter's marriage to entitle him to maintain a suit to inquire into its validity; but in *Bevan v. M^r Mahon & Bevan*, 2 S. & T. 58, the father having died after having instituted a suit for the nullity of his daughter's marriage, the Court held that It had no power to allow the widow to carry on the suit, as, at the time it was commenced, she had no interest in it, and could not then have instituted it; she was not at that time liable under the Act to be called upon to maintain her grandchildren, if any, as the statute confers no power of charging the grandfather and grandmother jointly with their maintenance.

In *Wells v. Cottam*, 3 S. & T. 364, it was held that the father of a minor petitioning for a decree of nullity of his child's marriage, must cite both the parties.

* In the revised edition of the statutes, S. VI., Vol. I. p. 672.

The case is to be established by the production of the marriage registers; the testimony of the parties, and of other witnesses; and by evidence of circumstances showing fraudulent intention.

The classes of misdescription will be best explained by the following train of cases in which decrees of nullity were pronounced.

In *Pouget v. Tomkins*,⁷ the christian names of the husband, who was a minor, were William Peter, but it was proved by the testimony of his family that the first name had been superseded in common use, and that he had been constantly called and known by the name of Peter only. The banns were published in the name of William Pouget for the purpose of concealing his identity from his father who was entirely ignorant of the transaction, and by whom the suit was brought.

Suppression of christian name.

In *Wiltshire v. Wiltshire*,⁸ the man's christian names being Henry John the banns were published in the name of John only at the instigation of the woman in order to conceal the marriage from his father.

⁷ 2 Consist. 142; 1 Phill. 499. In *Stanhope v. Baldwin*, 1 Add. 93, Augustus Henry Edward Stanhope was married by the names of Edward Stanhope only, and in order to conceal the marriage more effectually, he assumed on the occasion the dress of a groom or labouring man, the lady that of a maid servant. The marriage was in 1813, and the suit was instituted in 1822.

⁸ 3 Hagg. 332. In this case, the first under 4 Gt. IV. c. 76, the suit was instituted by the father, but was continued by the petitioner himself, on his coming of age.

In *Tongue v. Tongue*,⁹ Edward Croxall Tongue, a minor, was married to a widow aged thirty-five, and the banns were published in the names of Edward Tongue, by which he signed his name in the register—he having been always called by the name of Croxall only, the name of Edward having become entirely dormant and disused—and Mary Ann Allen, spinster. The marriage was without the knowledge of Tongue, the father, who, on discovering it, instituted the suit. It was held that the circumstance of the man having signed his name in the register showed that he must have known that the banns had been published in that name only, and that his doing so was a fraud.¹

In *Brealy v. Reed*,² a suit promoted by the woman, it was proved that both parties had concurred—with the view of concealing the marriage from the father of the man—in suppressing the name of Charles, the name by which he was always

⁹ 1 Moo. P. C. C. 90. See this case in the Court below, as *Tongue v. Allen*, 1 Curt. 38.

¹ But in *Wright v. Elwood*, 1 Curt. 49, 662, where the man caused the banns to be published between himself and Emma Elwood, spinster, she being at the time properly Amelia Elwood, and a married woman, though her husband died before the celebration of the marriage in question, it was held valid, as, at the period of publication, Wright supposed Mrs. Elwood was a spinster, and therefore it could not be said that this was a false publication with the consent and connivance of both parties.

See also, *Mayhew v. Mayhew*, 2 Phill. 11; *Hadley v. Reynolds*, referred to in *Tongue v. Allen*, 1 Curt. p. 47.

² 2 Curt. 833.

called, his christian names being Robert Charles, and the banns were published in the name of Robert only.

In *Orme v. Holloway*,³ a suit instituted by the father of the husband, a minor, it was proved that the banns were published in the names of William Orme only, his other baptismal name, Wheeley, being omitted; that the woman, a servant in the father's house, was also wrongly described as Harriet Spittle, she having been always known as Harriet Holloway; and that the parties had acted in concert for the purpose of concealing the marriage.

The insertion of an additional christian name Addition of name. or the substitution of such a name may be as fraudulent as the omission of one.⁴ In *Midgeley v. Wood*,⁵ a decree of nullity was pronounced on the woman's petition, she having agreed with the man that in order to conceal the marriage from his grandfather, upon whom he was dependent, the banns should be published in the names of John Wood, his only baptismal name being Bower.

The alteration or substitution of a surname may Alteration of surname.

³ 5 N. of C. 267.

⁴ For some cases under the first marriage Act, see *Fellowes v. Stewart*, 2 Phill. 238, 257, where the banns were published in the name of the man as William Douglas Dundas Stewart, then under his direction as William Dundas, his only baptismal name being William. See also *Tree v. Quin*, 2 Phill. 14; *Dobbyn v. Corneck*, 2 Phill. 102; *Green v. Dalton*, 1 Add. 289.

⁵ 4 S. & T. 267; 30 L. J. 57.

suffice; as in *Farquharson v. Farquharson*,⁶ where the man had paid his courtship to two girls, named respectively Elizabeth Stayte and Mary Hides, and in order to conceal their marriage, persuaded Elizabeth Stayte to marry him by the names of Mary Hides.

Surname
of illegiti-
mate child.

In several cases, the question has been raised as to what is the proper name of an illegitimate child; of which the results may be thus stated: that the name published should be that by which the person is generally known, but that as a name acquired by reputation may be superseded by another name of habit and reputation, there may be cases where the publication of the real name would defeat the object of the statute.⁷

* 3 Add. 282.

So in *Meddowcroft v. Gregory*, 2 Phill. 265, a suit by the father to annul the marriage of his son, a minor, the banns having been published in the name of William Widowcroft, was sustained. But in *Diddear v. Faucit*, 3 Phill. 580, where the man was married by the name of Faucit, whereas his real name was stated to be Savill—he was an actor, and passed by the name of Faucit—and there was nothing to show that there was any intention of imposing a false name for the purpose of deceiving any one, the suit was dismissed.

⁷ *Wakefield v. Wakefield*, 1 Consist. 394; 1 Phill. 134, where the woman in the course of her life had used a variety of surnames, but the Court held that, the banns having been published in the name of her mother, they had been published in her proper name. See Lord Stowell's observations in this case on the inconvenience of successively adopting a variety of surnames. See also *Wilson v. Brockley*, 1 Phill. 132.

In *Sullivan v. Sullivan*, 3 Phill. 45, the publication of the banns of an illegitimate child by the surname of her mother as

In *Tooth v. Barrow*,⁸ the petitioner, Charles Tooth, married a woman named Elizabeth Barrow, who was the illegitimate daughter of a person named Sarah Tooth—not related to the petitioner—and who, when her daughter was about four years old, married a man named Barrow. Elizabeth had constantly lived with them after their marriage, and was always called and known by the name of Barrow. In the banns, she was described by the names of Elizabeth Tooth, and not as being the daughter of her mother Sarah Barrow, but of her mother's brother, who, at the marriage, also represented himself as her father. It was held that the parties had knowingly and wilfully inter-married without due publication of banns.

A distinction has been established between a marriage by banns and a marriage by licence with respect to suits of nullity: that the publication of banns being a notice to all the world that the parties intend to contract a marriage, it is essentially necessary that the publication should be in the true names; whereas a licence being a dispensation from the necessity of publication of banns, is not of the same notoriety, but is granted by the

Distinction
between
marriages
by banns
and
licence.

well as by that of her father,* she having been born before the marriage of her parents, was held valid, there being nothing to show that fraud was intended by using the additional name, but, on the contrary, *ex abundanti cautela*.

* It is not an uncommon, though an erroneous opinion, that the name of the mother is the only true name for an illegitimate child.

⁸ 1 Eccl. & Adm. 371.

Ordinary on the evidence which he is content to receive—the oath of the party as required by the canons of the Church.⁹

To annul a marriage solemnized by licence therefore; it is not sufficient that there was an alteration of the name; there must have been an error respecting the person: there must have been not merely the assumption of a false name; but both parties must have knowingly and willingly acquiesced in the fraudulent substitution of one person for another.¹

⁹ See Canons C. to CIV: Cardwell, Synodalia, vol. 1. pp. 222, 304.

¹ *Cope v. Burt*, 1 Consist. 434, where the real name and description of the woman was Sarah Burt, spinster, and in the licence she was described under her assumed names of Elizabeth Melville, widow; but as the husband did not suppose that he was marrying Sarah Burt when he married Elizabeth Melville, the marriage was held valid. "If," said Lord Stowell, "it should appear that a licence procured for one person was transferred to another, it might be a fraud which the Court would be bound to notice."

In *Clowes v. Clowes*, 3 Curt. 185, the parties had been cohabiting for some time before the marriage, and the woman had passed by various names: the licence was obtained by the man in the names which she represented as her real and true names, but which were not so. On his petition for a decree of nullity, it was held that as both parties were able and willing and meant to contract the marriage in question, there was nothing to vitiate the licence.

See also *Bevan v. M'Mahon*, 2 S. & T. 230, where the woman petitioned for a decree of nullity on the grounds that the man had, by her direction, and for the purpose of concealing the marriage from the surrogate and from her family, suppressed one of her christian names, and falsely described her residence,

There is no reported case of a marriage by licence having been declared null and void.

DUE NOTICE OF MARRIAGE BEFORE REGISTRAR.

With respect to a suit for nullity of marriage under the Acts authorizing marriages before a Registrar,² it will be sufficient to refer to the case of *Holmes v. Simmons*,³ where it was held that the

and also his residence and occupation: the Court upheld the marriage, and confirmed the distinction between banns and licences above laid down.

With respect to the construction to be put on the words "licence from a person not having authority to grant the same," see *Dormer v. Williams*,* 1 Curt. 870, the woman's suit by reason of the licence having been obtained by the man for the marriage to be performed at the place therein named, whereas the marriage was in fact performed at another place; and it was held that as there was nothing to show that both parties had a guilty knowledge that the law was violated, the marriage could not be declared null.

* The case of *Balfour v. Carpenter*, 1 Phill. 204, being under the former marriage Act, does not throw much light upon the question whether a licence from a person not having authority to grant it would vitiate a marriage performed in pursuance of such licence.

² See 6 & 7 Wm. IV. c. 85, ss. 42, 43; 1 Vict. c. 22; 19 & 20 Vict. c. 119.

³ L. R. 1 P. & D. 523. And see the judgment of the Judge Ordinary in this case as to the analogy between banns and 'due notice' with respect to the consent of parents and others.

Although it may still be a question what would be the effect of a notice given in entirely false names, the result of the above decision and the construction there put upon the registration Acts seems to be that it would be very difficult to

"due notice" required for the validity of a marriage before a Registrar, is a notice conforming to the formalities provided by 6 & 7 Wm. IV. c. 85, and that the words "due notice" will be satisfied though the contents of the notice in respect of christian name or residence or other details are not strictly true or accurate.

INSANITY.

The next ground to be considered for annulling a marriage is the want of reason in either party at the time of entering into the contract, for as the very essence of the contract is consent; without soundness of mind there can be no consent binding in law; and if any contract more than another is capable of being invalidated on the ground of the insanity of either of the contracting parties, it should be the contract of marriage, an act by which the parties bind their property and their persons for the rest of their lives.⁴

It is not necessary that there should have been absolute idiocy or constant insanity; for those conditions would carry with them their own security and protection; and in either case, the forms preceding the ceremony and the ceremony itself could not be gone through without exposure and detection. But there must have been such a degree of

invalidate a marriage merely on the ground of non-compliance with the prescribed formalities.

⁴ *Turner v. Meyers*, 1 Consist. 414, where a suit by the man himself, after his recovery, on the ground of his past incapacity was sustained. *Hancock v. Peaty*, L. R. 1 P. & D. 335.

mental imbecility that the person was incapable of understanding the nature of the contract sufficiently to be bound by it. Suits of nullity have therefore been sustained where the marriages have been brought about by means of fraud and circumvention practised upon persons of very weak mind, though not actually insane.⁵

It is not sufficient that the person has been found Evidence. lunatic by commission: the Court must be satisfied by evidence produced before It, that the ground of nullity existed at the time of the alleged marriage.⁶

If there is evidence of disease of mind, the Court has no means of gauging the extent of the derangement consequent upon the disease or affirming the limits within which the disease might operate to obscure or divert the mental power.⁷

⁵ *Earl of Portsmouth*, by his committee, v. *Countess of Portsmouth*, 1 Hagg. 355; *Wilkinson v. Wilkinson*, 4 N. of C. 295.

⁶ *Earl of Portsmouth's case*, *ut supra*.

See the Acts, 15 Geo. II. c. 30, and 51 Geo. III. c. 37, by which the marriage of any person found lunatic by a commission is declared null and void.

⁷ *Hancock v. Peaty*, L. R. 1 P. & D. 335. This was a suit brought on the part of the woman on the ground of her insanity. A guardian *ad litem* having been duly assigned to her by the Registrar, the Court declined during the hearing of the petition to adjourn the case on the application of the respondent on the suggestion of the petitioner's recovery and of her desire for the discontinuance of the suit, or to appoint two medical men to examine her, and proceeded to determine the only issue raised: whether the woman was of sound mind at the time of her marriage.

The Court being satisfied that she was not of sound mind

CONSANGUINITY OR AFFINITY.

5 & 6 Wm.
IV., c. 54,
making
voidable
marriages
void after
August 31,
1835.

Previously to the passing of Lord Lyndhurst's Act, a marriage between persons within the prohibited degrees of consanguinity or affinity was a canonical and not a civil disability, and was voidable only by sentence of the Ecclesiastical Court during the lifetime of both parties;⁸ but by the 2nd section of 5 & 6 Wm. IV. c. 54, it was enacted that all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever.⁹

Legal without natural consanguinity is a sufficient bar, and a marriage within the prohibited

at that time, postponed pronouncing Its decree in order to give the respondent an opportunity, if so advised, of establishing the fact of her recovery, and intimated that if satisfied of her recovery, It would not pronounce a decree except at her instance. The guardian *ad litem*, after a lapse of three weeks from the delivery of the judgment, obtained a rule *nisi* for the respondent to show cause why a decree should not be pronounced, and the respondent not showing cause against the rule, the decree of nullity was pronounced.

⁸ See *Elliott v. Gurr*, 2 Phill. 16.

⁹ For the prohibited degrees and discussions respecting them: see Leviticus, chap. xviii., and the commentators; 32 Hen. VIII. c. 38, and Coke's exposition upon that statute, 2 Inst. 683; *The Queen v. Chadwick*, and other cases, 11 Q. B. 173; *Wing v. Taylor*, 2 S. & T. 278; *The Queen v. the Inhabitants of Brighton*, 1 B. & S. 447.

See also *Sherwood v. Ray*, 1 Moo. P. C. C. 353.

degrees is equally unlawful between legitimate as between illegitimate relations.¹

But marriage is necessary to create the degree of affinity which makes a subsequent marriage unlawful on the ground of affinity.

In *Wing v. Taylor*,² the husband petitioned for a decree of nullity of marriage on the ground of his having had intercourse with his wife's mother before his marriage with his alleged wife. The question was argued on demurrer, and it was held that affinity could not be so constituted by the law of England.

PRIOR MARRIAGE.

Either party may petition for a decree of nullity of marriage by reason of the other party having been at the time of the celebration of the marriage in question the spouse of another. The questions to be determined in such a suit are the validity of the prior marriage, and the co-existence of the parties at the time of the second ceremony. Other considerations may, however, arise.

In *Birt v. Boutinez*,³ an Englishwoman had been married to Boutinez, a Belgian, in Scotland. They afterwards went through a second ceremony of

¹ *Haines v. Jeffell*, 1 Ld. Raym. 68; *Woods v. Woods*, 2 Curt. p. 521; *The Queen v. the Inhabitants of Brighton*, 1 B. & S. 447.

² 2 S. & T. 278; 30 L. J. 258.

Again, in *Pagani v. Pagani & Vining*, L. R. 1 P. & D. 223, a plea by the respondents that the petitioner's marriage was invalid by reason of his prior intercourse with his wife's sister was rejected on demurrer.

³ L. R. 1 P. & D. 487.

marriage in Belgium, where Boutinez was domiciled; and after some years' cohabitation, a Belgian Court, of competent jurisdiction, pronounced a divorce, on the ground of mutual consent, dissolving the Belgian marriage, but not purporting to affect the Scotch marriage. The woman afterwards married Birt in England. On his petition, the Court, holding that the Scotch marriage was valid and subsisting, pronounced his marriage null and void.⁴

DEFENCES IN SUITS OF NULLITY.

There is, properly speaking, no defence which can be pleaded in answer to any suit for a declaration of nullity of marriage except a traverse of the allegations in the petition.

To a suit by either party on the ground of impotency or malformation, neither adultery nor cruelty can be alleged, for if the marriage be invalid, there can be no matrimonial offence.⁵

The effect of delay in those suits has been fully considered; but lapse of time is no bar to suits under the marriage acts⁶ or on the other grounds

⁴ The question was raised and discussed, but it was not necessary to determine it, whether the Court could have recognized the Belgian decree of divorce, if it had purported to dissolve the Scotch marriage.

⁵ *Anonymous*, Deane, 295; *Humphrey v. Williams*, 29 L. J. 62; *Taverner v. Ditchford*, 33 L. J. 105.

⁶ *Johnston v. Parker*, 3 Phill. 39, where upwards of twenty years had intervened between the marriage and the suit—*Duins v. Donovan*, 3 Hagg. 301, where a marriage in 1813 was inquired into in 1830.

except so far as it may affect the value of the evidence adduced.

Nor does the principle that a man cannot take advantage of his own wrong apply to these suits: misconduct, therefore, however gross, of the person proceeding in a suit on the ground of bigamy,⁷ cannot be alleged. It is doubtful, however, whether a man marrying a woman with a full knowledge that she was at the time insane would not afterwards be estopped from alleging her insanity as a ground of nullity, having treated her as sane when it served his purpose to do so.⁸

COSTS.

The responsibility for the costs in suits of nullity must depend upon the circumstances of the case and the conduct of the parties;⁹ and in the wide discretion given to the Court by the 51st section of the Divorce Act, It may make such order as to costs as may seem just. In *Midgeley v. Wood*,¹ where the man induced the woman to consent to

⁷ *Miles v. Chilton*, 1 Roberts. 684, where a responsive allegation by the woman, pleading that the man had by false representations of a divorce having been obtained from her husband, induced her to contract the second marriage, was rejected.

⁸ *Hancock v. Peaty*, L. R. 1 P. & D. p. 341.

⁹ In *Aughtie v. Aughtie*, 1 Phill. p. 203, where the marriage was annulled by reason of affinity at the suit of the *de facto* wife, no costs were given, the parties being very much *in pari delicto*. In *Fellows v. Stewart*, 2 Phill. 260, costs were given against the *de facto* husband, the fraud in the publication of banns having been on his part only.

¹ 4. S. & T. 267. ante, p. 209.

the undue publication of banns by telling her that it would be a good marriage, he was condemned in costs; but in *Wells v. Wells and Cottam*,² a suit by the father of the *de facto* husband, a minor, where the woman gave no evidence and her defence was unnecessary, the Court made no order as to her costs.

In *Hancock v. Peaty*,³ the next of kin having delayed instituting the suit for three years, and the respondent having in the mean time contributed to the petitioner's support, the Court made no order as to costs.

² 3 S. & T. 593.

³ L. R. 1 P. & D. 335. ante, pp. 215-6, *in notis*.

CHAPTER V.

Of the Suit for Restitution of Conjugal Rights—Defences. Suit for Jactitation of Marriage.

THE suit for restitution of conjugal rights is founded on the doctrine that by law married persons are bound to live together; and if either withdraw from cohabitation without lawful excuse, the other may by suit compel the party withdrawing to return to cohabitation.¹

Practically, however, the suit is usually founded on pecuniary motives: and is either brought by the wife, for the purpose of enforcing maintenance, or by the husband, because the wife has property settled upon herself. But into these considerations the Court does not enter, and unless such legal defence can be set up as is presently to be stated, always favours the suit.² But the utmost the

¹ It is not necessary to state in the petition that the respondent has withdrawn from cohabitation since any particular date: it is enough to allege that the party withdrawing has refused and still refuses to render to the petitioner conjugal rights. See Rules 175, 176, in Appendix.

² *Scott v. Scott*, 4 S. & T. 113; 34 L. J. 23.

In *Crothers v. Crothers*, L. R. 1 P. & D. 568, where the wife's suit appeared to be founded on a desire to obtain alimony, and the husband in his answer, stated his willingness to take her home, the Court, without giving any directions as to the mode of trial, ordered the matter to be adjourned into chambers.

Court can do is to compel conjugal cohabitation: It cannot for sufficiently obvious reasons, enforce matrimonial intercourse; a suit therefore cannot be maintained where the parties are living in the same house, and have merely parted beds.³

The petitioner must be free from any matrimonial offence. In *Hope v. Hope*,⁴ the question was raised whether, when both parties have been found guilty of adultery, the guilt of the wife is to be considered as abolished by that of the husband, so as to restore her to the condition of an innocent person with reference to her conjugal rights;⁵ and it was held that although it may not be competent to either party to obtain the assistance of the Court to punish the offence committed, it by no means follows as a reasonable consequence that each shall be bound to treat the other as an innocent person; and that the wife's suit for restitution could not be sustained.⁶

³ *Orme v. Orme*, 2 Add. 382. *Rowe v. Rowe*, 4 S. & T. 162, where an allegation by the husband, in answer to the wife's suit for judicial separation, that she had withdrawn herself from his bed and refused him conjugal rights, was ordered to be struck out.

⁴ 1 S. & T. 94.

⁵ The argument was founded on the doctrine of compensation: *Paria crimina compensatione mutuâ delentur*. As Sir C. Cresswell observed, "a singular kind of subtraction—to subtract crime from crime, and there remains nothing but innocence."

⁶ As a contrary decision, see the *Irish* case of *Seaver v. Seaver*, 2 S. & T. Append. p. 665, in which it was held that where both parties had been guilty of adultery, the Court would, at the suit of one of them, make a decree for restitu-

At the hearing of the case, the principal evidence Evidence. must of course be that of the parties; and although the suit may not be defended, the Court will not make a decree merely upon proof of the marriage: evidence of the facts of the case must be given.⁷

DEFENCES.

As a general rule, nothing can be pleaded in bar Adultery, cruelty, desertion. to a suit for restitution except such facts as would constitute a matrimonial offence, such as adultery or cruelty,⁸ or desertion for two years.

Therefore, although in some cases, answers have been admitted containing charges not so specifically pleaded as they would be required to be if alleged in a petition for divorce,⁹ and in others, attempts have been made to rest a defence on grounds less definite than those above stated,¹ the principle has

tion of conjugal rights. This decision was in 1846, but was not reported at the date of the judgment in *Hope v. Hope*.

⁷ *Pearson v. Pearson*, 33 L. J. 156; *Scott v. Scott*, 4 S. & T. 113; 34 L. J. 23.

⁸ *Holmes v. Holmes*, 2 Lee, 116. In *Burroughs v. Burroughs*, 2 S. & T. 303, a plea of a "reasonable suspicion of adultery" was rejected on demurrer.

⁹ *Moore v. Moore*. 3 Moo. P. C. C. 84, where the husband's answer containing charges of adultery not specific enough to found a suit for divorce, were admitted.

Stace v. Stace, 37 L. J. 51, where the Court refused to reject on demurrer an answer alleging facts which might or might not constitute a case of cruelty.

¹ In *Molony v. Molony*, 2 Add. 249, the wife pleaded that her husband, the petitioner, had no residence but one in Ireland, and such was her state of health, it was the opinion of her

never been departed from in the decision of any suit, that such a matrimonial offence must be proved as would justify the Court not only in refusing a decree of restitution, but also in decreeing, if the respondent asks it, a sentence of separation.

Violence on the part of a wife under the influence of insane delusions cannot be alleged by the husband in answer to her suit.¹

The respondent may in the answer pray for a judicial separation, and in such a case has a right to proceed and prove the allegations in the answer

medical advisers that she could not return to live in Ireland without peril to her health, perhaps to her life. The Court admitted the allegation, not choosing to decide that the facts pleaded were wholly irrelevant, especially the wife's state of health. The case, however, went no further.

In *Connelly v. Connelly*, 2 Roberts. 201; 7 N. of C. 444, the wife's answer to her husband's suit, in which she pleaded that the parties had abjured the Protestant faith and embraced that of Rome; that the husband had, by the authority of the Pope, taken holy orders in the Church of Rome, and she, after a vow of perpetual chastity, had entered a convent; that the parties by mutual consent might under such circumstances, by the law of the Roman Catholic Church, lawfully separate in order that they might enter into religion; and that such separation, approved and allowed by the Pope, debarred the parties from matrimonial cohabitation, was rejected. On appeal, 7 Moo. P. C. C. 438, the allegation was admitted, and directed to be reformed by pleading the law of Pennsylvania—the marriage having taken place at Philadelphia in that state—as applicable to the circumstances, in case the suit had been brought to adjudication there, and also the domicile of the husband at the time of the transactions at Rome.

¹ See *Hayward v. Hayward*, 1 S. & T. 81.

on which the prayer is founded, although the petitioner may desire to withdraw the suit for restitution.²

It has been contended that according to the *dicta* to be found in some ecclesiastical cases, the same strictness of proof ought not to be required in support of a matter pleaded by way of defence as when the same matter is alleged in a petition,³ but there is no decided case to that effect; and in *Sopwith v. Sopwith*,⁴ it was held on demurrer that the respondent was estopped from pleading in answer to her husband's suit for restitution, the same charges of adultery which she had alleged, but failed to prove against him in her suit for judicial separation.

A deed of separation or an agreement between husband and wife to live apart is no bar to a suit by either for restitution of conjugal rights;⁵ but such a deed may be alleged in answer to an allega-
Deed of separation.

² *Blackborne v. Blackborne*, L. R. 1 P. & D. 563.

³ *Forster v. Forster*, 1 Consist. p. 153; *Bramwell v. Bramwell*, 3 Hagg. 619.

⁴ 2 S. & T. 160.

⁵ *Spering v. Spering*, 3 S. & T. 211.

In *Warrender v. Warrender*, 2 Cl. & Finn. p. 527, Lord Brougham said: "What is the legal value or force of this kind of agreement in our law? Absolutely none whatever—for any purpose whatever, save and except only one—the obligation contracted by the husband with trustees to pay certain sums to the wife, the *cestui que trust*. In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract. No damages can be recovered for its breach—no specific performance of its articles can be decreed."

tion in the petition, that from the date of the deed the respondent has without just cause refused to cohabit with the petitioner.⁶

If by the answer the validity of the marriage is put in issue, the cause may assume the shape of a suit for nullity of marriage.⁷

The decree
and its en-
forcement.

When a decree has been made at the suit of the wife, and served upon the husband, ordering him to take his wife home, he is bound to take the first step by inviting her to return to him.⁸ When the decree is made at the suit of the husband, it is the wife's duty to obey the order and return home.

The party not obeying such order is, in either case, liable to attachment for contempt; and if imprisoned, can only be released upon signifying a *bonâ fide* willingness to comply with the order of the Court.⁹

When the respondent is out of the jurisdiction the Court may enforce Its order by sequestration.

In *Miller v. Miller*,¹ a decree having been pronounced at the suit of the husband—the charges which the wife made in her answer having been abandoned at the hearing—and the Court being satisfied that the respondent had a sufficient separate income, condemned her in the costs of the proceedings.² The respondent was abroad, and though

⁶ *Anquez v. Anquez*, L. R. 1 P. & D. 176.

⁷ *Swift v. Swift*, 4 Hagg. 139.

⁸ *Alexander v. Alexander*, 2 S. & T. 385.

⁹ See *Barlee v. Barlee*, 1 Add. 301.

¹ L. R. 2 P. & D. 13, 54.

² This was the first case in which the question was distinctly

she paid the costs, did not obey the order of the Court to return to her husband at all. The Court directed a writ of sequestration to issue against her estate, in the first instance, without attachment.³

JACTITATION OF MARRIAGE.

Jactitation is where one person boasts or gives out that he or she is married to the other ; and the suit is instituted to put a stop to such jactitation.⁴

In answer, the party proceeded against might justify the jactitation and plead marriage. If the marriage was not proved, the jactitator was "enjoined to perpetual silence on the subject."⁵

raised and argued as to the power of the Court to condemn a wife in costs.

³ The question as to what property might be subject to the writ was reserved ; but, ultimately, the suit was settled.

⁴ These suits appear to have been not uncommon in the Ecclesiastical Courts till about the year 1776, when they were brought into disrepute by the celebrated trial of the Duchess of Kingston for bigamy. *State Trials*, vol. xx. 355.

⁵ *Walton v. Rider* ; *Wescombe v. Dods*, 1 Lee's Eccl. cas. 16, 59. And see *Hawke v. Corri*, 2 Consist. 280.

Jactitation seems, however, to be no longer practised : at least, there are no suits, although the possibility of their legal existence was recognized by the Divorce Act.

CHAPTER VI.

Provision for Wife: Alimony pendente lite—Permanent Alimony on Sentence of Judicial Separation—Permanent Provision for the Woman on Decree of Dissolution of Marriage—Settlement of Damages.

THE subjects to be treated of in this chapter may be conveniently reduced under the following divisions: first, alimony pending the suit; secondly, permanent alimony after a sentence of judicial separation; thirdly, permanent provision for the woman after a decree of dissolution of marriage; and herein, of the settlement of the damages recovered from the co-respondent for the benefit of the respondent or the children of the marriage.

Alimony pendente lite is that allowance which the wife, whether petitioner or respondent in any matrimonial suit,¹ is entitled to receive from her

¹ By s. 32 of the Divorce Act, upon any petition for dissolution of marriage, the Court has the same power to make interim orders for payment of money by way of alimony or otherwise to the wife as it would have in a suit instituted for judicial separation. That she has not answered a charge of adultery does not affect her right to alimony, for she is presumed to be innocent until proved guilty. So also in a suit of nullity, for there is, at least, a *de facto* marriage, and until it is pronounced void, she is presumed to be a wife. *Bird alias Bell v. Bird*, 1 Lee, 209; *Miles v. Chilton*, 1 Roberts. 684. And this is so, even though fraud in procuring the marriage is expressly charged against her. *Countess of Portsmouth v. Earl of Portsmouth*, 3 Add. 63.

husband in proportion to his means, and the payment of which the Court enforces in order that she may be subsisted pending the litigation which is to determine the rights of the parties. The rule is founded on the assumption that the wife has no separate fortune, that by marriage everything becomes the property of the husband, and that having no other means of support; unless the husband is ordered to give up a fair proportion of his income to her, she will be without the means of subsistence. Where, however, the foundation of the rule is taken away, the rule fails.

Alimony is therefore to be considered, first, as allotted in proportion to the husband's means; secondly, when it is refused by reason of the wife having independent means; thirdly, when it cannot be allotted by reason of the husband having no income, or means so small that they cannot be taken into account, for, *de minimis non curat lex*.²

² As to the procedure on petitions for alimony, see Rules 81 to 94, and Form no. 13 in Appendix. With respect to the petition, it is only necessary to say that the wife should state her husband's means as accurately as possible: exaggeration only causes needless disputes.

The husband, in his answer—see Rule 84—should set out his income for the three years at least preceding the institution of the suit, *Williams v. Williams*, L. R. 1 P. & D. 370: if the answer be unsatisfactory, he may be required to give a further and fuller answer, Rule 86. If he files no answer within the time allowed by Rule 84, the Court may make a peremptory order upon him to file an answer within a certain time, *Snowdon v. Snowdon*, L. R. 2 P. & D. 200. Whether

Mode of
estimating
income.

In estimating the husband's income for the purpose of allotting alimony, the value of all marketable securities and property of every kind convertible into money may be included in the calculation; and such property as is unproductive

the husband answers the petition or not, he may in the one case, either be ordered to attend under Rule 86, for the purpose of being cross-examined on his answer, or in either case, the wife may subpoena him as a witness on her petition under Rule 89. *Anderson v. Anderson*, L. R. 1 P. & D. 512; and if he fail to attend on his subpoena, he will be liable to an attachment. *Jennings v. Jennings*, L. R. 1 P. & D. 35.

At the hearing, the wife and other witnesses may be examined; but if the husband has not filed an answer, he cannot cross-examine the witnesses or contradict their evidence. *Constable v. Constable*, L. R. 2 P. & D. 17. If the inquiry into the husband's means appears to necessitate an examination of books and accounts, the matter is referred to the Registrar.

Alimony *pendente lite* may be applied for at any time before the hearing of the cause, *Phillips v. Phillips & Medlyn*,* 4 S. & T. 129; 34 L. J. 107; but it cannot be allotted after the wife has been found guilty of adultery—after a decree *nisi* has been pronounced at the suit of the husband. *Winstone v. Winstone & Dyne*, 2 S. & T. 246; *Noblett v. Noblett & Kershaw*, L. R. 1 P. & D. 651.

* Where, though the case was not in the list for the day, the Court allowed the petitioner's witnesses to be examined to save him expense, on the understanding that if the respondents intimated their intention to defend the suit, the case should be retried. The evidence proved the respondent's adultery. Subsequently, on an application for alimony *pendente lite*, the respondents having in the meantime given notice of their intention to defend, the Court declined to treat the evidence so taken as a step in the cause, and allotted alimony.

—furniture, for instance, may be chargeable with a per-centage.³ Reversionary property—that is, property in which the husband is entitled to a vested interest expectant on the death of some person or the happening of some other contingency—may properly be stated; but the reasonableness of charging it with alimony must depend upon the circumstances.⁴ With respect to professional and trade incomes, the Court looks to the average earnings of the husband during the last few years, and generally will assume that in the current year his earnings will be at about the same rate—a medical man, for instance, may be presumed to derive as large an income in future years as in past—although when his answer to the petition for alimony is filed, he may for a time be out of employment.⁵

As alimony is allotted, not upon the gross, but upon the net income, in order to arrive at the latter amount, certain deductions are allowed to be made. Where the income is derived from real property,

Deductions.

³ See *Hayward v. Hayward*, 1 S. & T. 85.

⁴ *Stone v. Stone*, 3 Curt. 341. In *Bruere v. Bruere*, 1 Curt. 566, alimony *pendente lite* was refused, the husband having taken the benefit of the Insolvent Act, but as it appeared that he would be entitled to an income in reversion after his father's death, the Court stayed the proceedings until some small sum by way of maintenance was afforded to the wife.

⁵ As in *Thompson v. Thompson & Johnson*, L. R. 1 P. & D. 553, where the husband in his answer stated that he earned as master mariner £144 per ann.; that he was then out of, and had no present prospect of obtaining employment; and that he owned one-fourth part of a certain vessel, the market value of which fourth part was, at most, £500. The Court estimated his income at £160, and allotted the wife £32 a year.

the expense of ordinary current repairs may be deducted, but not of extraordinary and permanent improvements which ought to be charged on the total fund of the income.⁶ With respect to house property, the gross rental should be stated, and then the particulars of the charges and outgoings claimed to be deducted from the rent. So with income derived from trade, the gross annual income should be stated and the deductions to be claimed specified.⁷

Life
Policies.

In general, the husband is not allowed to deduct sums paid by way of premium to maintain a Policy of Assurance on his life, inasmuch as it is capable of being converted into money;⁸ but where such a Policy was under settlement for the benefit of the wife and children after the husband's death, and the premium was deducted from his salary, and paid to the Assurance Office by his employers, the amount of the premium so deducted was allowed in estimating his income.⁹

Amount
of alimony.

Alimony pending the suit is usually allotted at the rate of one-fifth of the husband's *net* income as a fair medium; but the proportion is not subject to any strict rule, and is liable to variation—from

⁶ *Hayward v. Hayward*, 1 S. & T. 85.

⁷ *Nokes v. Nokes*, 3 S. & T. 529; 33 L. J. 24.

See also *Crampton v. Crampton & Armstrong*, 32 L. J. 142.

⁸ *Harris v. Harris*, 1 Hagg. 351.

⁹ *Forster v. Forster & Thomas*, 2 S. & T. 553. Where the husband had contracted to pay a debt by annual instalments, the amount of each instalment was allowed to be deducted from his annual income; but not the premiums on a policy on his life. *Patterson v. Patterson & others*, 33 L. J. 36.

about one-third to one-sixth—according to circumstances.¹ In *Hawkes v. Hawkes*,² a suit by the husband, his income as an officer in the army in India was admitted to be £1700 per annum. The Court, considering his expenses, and that he had three children to educate and maintain, allotted the wife £250 per annum.

In *Harris v. Harris*,³ the husband had two children to educate and maintain, and the expenses of the suit to pay. The Court estimating his income at £250 per annum derived from shares in certain Insurance Offices, although at the time such shares were not actually productive of income, allotted the wife £75 per annum; but directed that certain debts incurred by her and paid by him should be first deducted. So in *Hayward v. Hayward*,⁴ the husband's responsibility for debts

¹ In *Smith v. Smith*, 2 Phill. 152, the husband's income being taken at £1500, and the wife having £300 separate allowance, £200 in addition was allotted.

² 1 Hagg. 526.

³ 1 Hagg. 351.

It has been held that the fact that a husband has several children, the issue of a former marriage, to maintain, is no ground for allotting less than one-fifth, *Hill v. Hill*, 33 L. J. 104; but in *Bird alias Bell v. Bird*, 1 Lee, 418, where the man was an anvil maker, and got by his trade £100 a year clear, and was worth about £1000; had three children by a former wife, and ten grandchildren, whom he at times assisted with money: alimony *pendente lite* was allotted at £20 a year.

⁴ 1 S. & T. 85.

In *Weber v. Weber & Pyne*, 1 S. & T. 219, the husband's income did not clearly appear, but as he had under a deed of

incurred by the wife⁵ was taken into consideration, and on an estimated income of £600 per annum, to be derived from various real and personal property, £150 per annum was allotted.

Reduction
of alimony
by reason
of reduced
means.

If the husband's income has been reduced since the original allotment of alimony, the alimony may be reduced in proportion on proof of such reduction, as in *Cox v. Cox*,⁶ where it appeared that the husband's income had been diminished in consequence of the reduction of his stipend under Government, without any default on his part; but if it does not appear how the income came to be diminished, or how a sum of money has been spent, as in *Shirley v. Wardrop*,⁷ where Colonel Shirley failed to explain how a sum of money which he had received for his commission had been spent—the Court may decline to interfere.

Alimony
refused
when wife
has means
of her
own.

Where the wife is in possession of an income, whether derived from property settled to her separate use, or from her own earnings—as in the case of a husband and wife supporting themselves by tuition or in service—the Court will take it into

separation allowed his wife £52 a year, which he had ceased to pay after the date on which he alleged that he had obtained evidence of her adultery, the Court made an order for alimony at the same rate.

⁵ That is to say—to a reasonable amount according to the social position of the parties. The Court will not assume that the husband would be held liable to pay extravagant debts which he had never sanctioned.

⁶ 3 Add. 276. His income had been reduced from £1680 to £1080, and the alimony was reduced from £300 to £220.

⁷ 1 S. & T. 317.

account; and if it appears that the wife has long lived apart from her husband without an allowance, and that she has been and continues able to provide sufficient means for her decent subsistence, may refuse to allot alimony.

In *Goodheim v. Goodheim* and *Frankinson*,⁸ it appeared that the husband's net annual income was about £100; that his wife when she left him took with her furniture and linen to the value of about £80; and that she was occupying a house and maintaining herself in comfort by letting lodgings; alimony was refused.⁹ So if the wife is in possession of property which would enable her to maintain herself pending the suit: as in *Bremner v. Bremner* and *Brett*,¹ where the husband by his answer admitted an income of £600, but alleged that his wife had during his absence left his house, and removed all his furniture and other property, worth upwards of £800; the Court refused on that state of things to make any order, but allowed the wife to file affidavits in reply: subsequently, alimony was allotted by consent.

In *Coombs v. Coombs*,² the husband's net income from his business as a baker did not amount to more than £60 a year, and the wife had a sum of

⁸ 2 S. & T. 250.

⁹ So in *Burrows v. Burrows*, and *George v. George*, L. R. 1 P. & D. 554, the wives had been living apart from their husbands for some years and supporting themselves in service: in both cases, alimony was refused, although the husbands had respectively incomes of £200 and £225 a year.

¹ 3 S. & T. 249; 32 L. J. 119.

² L. R. 1 P. & D. 218.

£70 in her possession at the commencement of the suit: alimony was refused.

In *Eaton v. Eaton and Campbell*,³ the wife had an allowance from her father of £100 a year, paid in one sum in the month of March each year, in pursuance of a written promise from him to her husband. The Court refused to make any order for alimony, the husband having very small means, the month not having arrived when the allowance might be expected to be paid.

On the same principle, the wife is not entitled to alimony while she is living with the co-respondent, and is supported by him; not because she is living in adultery, but because she has means of support independent of her husband.⁴

When the husband is without means.

Where the husband has no income, or means so small that they cannot be legally taken into account, it follows that alimony cannot be allotted: as in *Fletcher v. Fletcher*,⁵ where the husband, a master pilot in Her Majesty's Bengal Pilotage

³ L. R. 2 P. & D. 51.

⁴ In *Holt v. Holt & Davis*, L. R. 1 P. & D. 610, it appeared that the respondent had been living with the co-respondent from the time of the service of the citation in February 1868, till the 21st August 1868. The husband having admitted an income of £500, the Court allotted her £100 per annum, to commence from the 21st August.

And see *Madan v. Madan & De Thoren*, 37 L. J. 10.

But the Court refused to rescind an order for alimony on an allegation upon affidavits that the wife was maintaining herself by prostitution, she in her affidavit denying the charge, which was the main question in the suit. *Patch v. Patch*, 38 L. J. 27.

⁵ 2 S. & T. 434.

Service, had obtained leave of absence for six months without pay in order to institute his suit, and was neither possessed of any property nor in receipt of any income whatever, but was entirely dependent on his friends.⁶ And in *Brown v. Brown and Simpson*,⁷ where the husband's only property—he being maintained by his father—was a legacy of £500, not payable for some months after the application for alimony: the Court refused to allot alimony upon it.

In no case has a free and voluntary allowance made to the husband been considered as income out of which alimony could be allotted.⁸

Nor is the guardian of an infant liable as such to payment of alimony.⁹

Alimony is usually made payable from the date of the service of the citation in the cause; and may be ordered to be paid in quarterly, monthly, or weekly instalments, according to its amount, and the position and convenience of the parties: its duration depends upon the nature of the suit.

In a suit by the husband for dissolution of marriage tried before the Court itself, the alimony ceases on the decree *nisi* being pronounced: when the cause is tried before a jury, it continues payable till the time has elapsed for moving for a new

⁶ Where the husband was in insolvent circumstances, and had only weekly wages of meat, drink, washing, lodgings, and 4s a week, alimony was refused. *Capstick v. Capstick*, 33 L. J. 105.

⁷ 3 S. & T. 217.

⁸ *Haviland v. Haviland*, 3 S. & T. 114.

⁹ *Beavan v. Beavan*, 2 S. & T. 652.

Duration
of alimony
pending
suit.

trial; and if that is refused by the Court, till the further time for appealing from such refusal has elapsed,¹ and when a rule for a new trial has been granted in such a suit, the alimony *pendente lite* continues payable without any fresh order.²

When the wife is petitioner for dissolution of marriage her alimony continues payable until the decree is made absolute.

In *Whitmore v. Whitmore*,³ the wife had obtained a decree *nisi*; but the Queen's Proctor intervened, shortly before the time for making it absolute, and proved that she had committed adultery while the suit was pending, and the decree was thereupon rescinded. Subsequently, on motion for an attachment against the husband for nonpayment of arrears of alimony *pendente lite*, it was held that she was entitled to alimony up to the date that she was found guilty of adultery.

In a suit for judicial separation, alimony *pendente lite* having been awarded, it will generally continue payable pending an appeal to the Full Court.⁴

Permanent
alimony
after
decree of
judicial
separation.

Permanent alimony⁵ is allotted on a more liberal scale than alimony *pendente lite*; and varies in amount from one-third, which is the usual proportion, to one moiety according to the conduct of the parties, their position in life, and the circum-

¹ *Latham v. Latham & Gethin*, 2 S. & T. 299. *Wells v. Wells & Hudson*, 3 S. & T. 543.

² *Nicholson v. Nicholson & Ratcliffe*, 3 S. & T. 214.

³ L. R. 1 P. & D. 96.

⁴ See *Jones v. Jones*, L. R. 2 P. & D. 333.

⁵ See Rules 91 to 93 in Appendix.

stances of the case: namely, whether the husband or the wife has the custody of the children; whether it is made payable out of the joint income of the parties, or out of the separate income of the husband.

Under any circumstances, however, the Court is bound by the practice of the Ecclesiastical Courts in this respect, and although in some cases it would perhaps be only just that where the fortune originally belonged to the wife, and the cohabitation has become impossible by reason of the husband's misconduct, she should receive back the money which she brought to the common fund—the utmost It has power to allot is one moiety of the joint income.⁶

In *Durant v. Durant*,⁷ the wife had £120 a

⁶ *Cooke v. Cooke*, 2 Phill. 40, where the bulk of the property having been the wife's, the Court gave a moiety. In *Pomfret v. Pomfret*, referred to in the above case, the position of the husband, as a peer, was considered, and out of his income of £12000, alimony was allotted at the rate of £4000. *Otway v. Otway*, 2 Phill. 109, where the Court would have given a moiety, but considering that the husband had six children to maintain—the joint income being £5,500, the greater part of which came from the wife—allotted her £2000 per annum. *Smith v. Smith*, 2 Phill. 235, the joint income being £2000, and the bulk of the fortune having been the wife's, and the husband having forcibly taken her infant daughter from her, the Court gave a moiety—£1000. In *Haigh v. Haigh*, L. R. 1 P. & D. 709, the entire income of the husband, £341 per annum, was derived from property comprised in a marriage settlement, of which £210 was derived from property formerly belonging to the wife. The Court allotted her £170 per annum, payable quarterly.

⁷ 1 Hagg. 528.

year of her own; the husband's net income, after deducting outgoings, mortgages, interest on debts, annuity to his mother, was estimated at £4000. In consideration of the large family he had to provide for—twelve children, sons and daughters—the Court decreed £600 in addition to the wife's separate income.⁸

In *Mytton v. Mytton*,⁹ where the husband's cruelty and adultery had been of a very gross description: his real estate being £6000 a year, subject as alleged by him to large incumbrances, the mother's jointure having been £1000, and the wife's pin-money £500 a year, the Court allotted £1000 a year, allowing the husband to deduct from that sum any payment on account of pin-money above £200 a year—the sum agreed to be paid to the wife for the maintenance of the children.

In *Frankfort v. Frankfort*,¹ the husband's in-

⁸ In *Kempe v. Kempe*, 1 Hagg. 532, the husband having £750 per annum, £250 was allotted on the understanding that the wife would take charge of the only child, an infant under a year old.

⁹ 3 Hagg. 657.

¹ 3 N. of C. 68. In this case, a bond given by the husband to a woman to provide for her and his illegitimate child was considered not to be given for an immoral consideration, and might therefore be fairly deducted from his income. Subsequently, in the same case, 4 N. of C. 280, the husband having deducted the income tax upon the whole of his property, and the allotment having been made upon his net income, he was not allowed to deduct the tax a second time from the payments to the wife.

In *Harmar v. Harmar*, Deane, 282, the husband was not allowed to deduct from permanent alimony sums paid by him

come being taken at between £2,700 and £3000, £800 a year was allotted as permanent alimony.

In *Deane v. Deane*,² the Court on pronouncing a decree of judicial separation on the ground of the husband's adultery—it appearing that his income was £164, and that there were eight children, none of whom were with him—allotted £80 per annum. In *Whieldon v. Whieldon*,³ the Court having given the wife the custody of the three children, all under seven years of age, allotted her £160 per annum=£100 for herself, £20 for each of the children—the husband's income having been taken at £400 when alimony *pendente lite* was allotted.

The husband's conduct towards his wife as disclosed at the hearing of the cause is also to be considered.

In *Moore v. Moore*,⁴ the husband, respondent in a suit on the ground of cruelty, stated on affidavit that, since alimony *pendente lite* had been allotted, he had disposed of his business from which his income was derived, in consideration of a yearly payment of £300 for seven years, and £5 per cent interest on stock-in-trade, &c. The Court, treating the £300 yearly as income, allotted £150 per annum, observing that the circumstances of the case were not such as to entitle the husband to

on account of debts incurred by the wife before the allotment of alimony *pendente lite*, she not having had at that time any means of subsistence, and having been obliged to separate from him by reason of his cruelty.

² 1 S. & T. p. 93.

³ 2 S. & T. 388.

⁴ 3 S. & T. 606; 34 L. J. 146.

any indulgence, as he had acted with savage violence to the petitioner, who was much injured in consequence.

Profes-
sional
incomes.

In allotting alimony on professional incomes, the Court will take into consideration the circumstance that the husband is obliged, in order to earn such income, to live in a more expensive place than the wife; and in such cases may allot less than the usual proportion, as in *Louis v. Louis*,⁵ where alimony had been allotted at the rate of £40 per annum on the husband's income of £120 as a lieutenant in the Indian army, he being then in England on furlough: on his promotion to a captaincy under orders to proceed to India, where on his arrival his pay would be £480 per annum, the wife applied for an increase of alimony, and the Court, considering the greater expense he would incur by having to live in India, allotted her, instead of £160, which would be the usual proportion, £120 per annum, to commence at the same time as the increased pay of the respondent.

Separation
at suit of
husband.

Even where the husband obtains a judicial separation by reason of the cruelty of his wife, she is entitled to a provision in the nature of permanent alimony;⁶ and the Court may make it a condition of pronouncing the decree that such a provision be made for her.⁷

⁵ L. R. 1 P. & D. 280.

⁶ *Prichard v. Prichard*, 3 S. & T. 523, overruling the cases of *White v. White*, 1 S. & T. 591, and *Dart v. Dart*, 3 S. & T. 208, in which Sir C. Cresswell had refused alimony under such circumstances.

⁷ *Forth v. Forth*, 36 L. J. 122. But the husband will not

Permanent alimony is allotted in proportion to the actual income of the husband: it may, therefore, be increased or diminished in accordance with his varying fortunes;⁸ and as the wife may apply for an increased allowance if she can show that her husband's income has been permanently augmented; so he on the other hand may obtain leave to reduce such allowance on proof of the reduction of his own income or the accession of that of his wife.⁹

In *Saunders v. Saunders*,¹ alimony having been allotted by the Consistory Court on a decree of divorce *a mensâ et toro* on the ground of cruelty, at £300 per annum by consent, the husband applied for a reduction, his wife having, by her own admission, come into an income of £144 per annum. The Court rejected the application, as there was nothing to show upon what computation the alimony was originally allotted, or that it would be unreasonable, taking into consideration the admitted income of the wife.

be required to give a bond with sureties to secure the payment of such provision.

⁸ For this reason, the Court will not, in allotting alimony on a decree of judicial separation, order the husband to execute a deed charging stock with a yearly payment. See *Hyde v. Hyde*, 4 S. & T. 80; 34 L. J. 63.

⁹ See *De Blaquiére v. De Blaquiére*, 3 Hagg. 322.

In *Neil v. Neil*, 4 Hagg. 273, permanent alimony having been allotted in 1813 at the rate of £200 upon the husband's then income of £967, the payments of which were constantly in arrear: an application by him in 1832 to moderate the amount on the ground that he had been speculating in unprofitable investments was refused.

¹ 1 S. & T. 72.

To whom
payable.

Alimony, either pending suit, or permanent alimony, is always made payable to the wife herself, but it may, at her desire, be made payable to her attorney upon a written authority being brought into the Registry from the wife authorizing him to receive it.² The attorney has a lien upon the alimony so passing into his hands for any costs incurred on her account, and allowable as between attorney and client.³

The payment of alimony may be enforced either by writ of *fieri facias*,⁴ or by sequestration in general terms against all the goods and chattels of the respondent;⁵ or in extreme cases, by attachment.⁶

Permanent
provision
on decree

Permanent provision for the maintenance of the woman after a decree of dissolution of marriage

² *Brown v. Brown*, 4 S. & T. 144; 34 L. J. 102. And see Rule 94 in Appendix.

³ *Ex parte Bremner*, L. R. 1 P. & D. 254.

⁴ *Ward v. Ward*, 1 S. & T. 484.

⁵ In *Clinton v. Clinton*, L. R. 1 P. & D. 215, the Court had made a order on the respondent for payment of permanent alimony at the rate of £110 per annum, so long as he was in receipt of a rent-charge of £400 per annum—his only source of income—the trustees of which had a discretionary power to refuse payment. Before the date of the order, the respondent had become a bankrupt, but though the trustees had continued to pay him the rent-charge, he had not paid the alimony. The Court directed a sequestration in general terms to issue against the property of the respondent, without expressing any opinion as to whether it would touch the fund in question.

⁶ See the Rule under the debtors' Act, in Appendix.

may be considered under two heads: first, where she is the petitioner in the cause; secondly, where the husband is the petitioner, and herein, of the settlement for her benefit and of the children, if any, of the damages recovered from the co-respondent.

By the 32nd section of the Divorce Act, the Court may, if it shall think fit on any such decree, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money, for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband and to the conduct of the parties, it shall deem reasonable,⁷ and for that purpose may refer it to any one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties; and the said Court may in such case if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed.⁸

⁷ For the procedure on petitions under this section, see Rules 95 to 103 in Appendix.

The application must be made by a separate petition to be filed after the decree *nisi* and before the decree absolute; and Rule 98 requiring the husband to file an answer to it on oath will not be dispensed with merely on the ground that the wife has a separate income, as the Court cannot act upon the statute without inquiring into the respective means of the parties. Although the inquiry may be gone into at any time after the decree *nisi*, the order upon it is not made until the decree absolute. See *Charles v. Charles*, L. R. 1 P. & D. 260.

⁸ In order to meet the "circumstances of those, who with

The Court, in exercising the large discretionary power conferred upon It by this section, has to take into consideration the fortune of the wife (if any), the ability of the husband to pay, and the conduct of the parties as disclosed at the hearing of the cause.

Where
wife is
petitioner.

Where the wife is the petitioner, the Court, in construing and applying this section, has held that, though it is not desirable that the wife should have a pecuniary interest in preferring divorce to judicial separation, it is still less desirable that an adulterous husband should have a pecuniary interest in adding cruelty or desertion to his adultery, and thus evading the permanent alimony allowed on judicial separation, which would be the case if the amount of the maintenance to be accorded to his

a sufficient income from their labour, have no realized property," the powers of the Court were amended by 29 Vict. c. 32, which after reciting in the preamble the section above set out; and that whereas it sometimes happens that a decree for a dissolution of marriage is obtained against a husband who has no property on which the payment of any such gross sum or annual sum can be secured, but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives: enacts; S. 1:—"In every such case it shall be lawful for the Court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable: Provided always, that if the husband shall afterwards from any cause become unable to make such payments it shall be lawful for the Court to discharge or modify the order or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as to the Court may seem fit."

wife varied, not with his misconduct, but with the form of her remedy. The Court is therefore inclined, where the circumstances admit and justify its doing so—to order the husband to secure the woman on a decree of dissolution of marriage, the same allowance, so long as she remains chaste and unmarried, as he would have to make on a decree of judicial separation.

In *Fisher v. Fisher*,⁹ it appeared that the petitioner had no fortune of her own; that the husband had some fortune and trading profits, neither large nor certain; and it was agreed that the daughter should remain with her mother and be maintained by her. Under these circumstances, Sir C. Cresswell thought that he ought not to award more than a maintenance, and directed that so long as the petitioner led a chaste life and remained sole and unmarried, and maintained the daughter, the respondent should pay her an annuity of £100 per annum: in the event of the death or marriage of the daughter, to be reduced to £80.

In *Sidney v. Sidney*,¹ the wife had a separate income of £150, and the respondent, who was proved to have treated her very brutally, had an income, from private and professional sources, of about £1100. Lord Penzance, acting on the principles above stated, with the view of giving the petitioner about the same income she would have received as permanent alimony, decreed that the

⁹ 2 S. & T. 410; 31 L. J. 1.

¹ 4 S. & T. 178; 34 L. J. 122.

respondent should secure to her, *dum casta et sola vixerit*, the annual sum of £245, and that it should be referred to one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper instrument or deed for that purpose.

As, however, the order for maintenance under this section can only be made on the decree being made absolute; it is of a permanent character, and cannot, like permanent alimony, be varied to meet the varying fortunes of the husband.

Where, therefore, the respondent had only a small professional income, and the petitioner was entitled to a sum in reversion, which was imminent, the Court refused to make any order.²

Where the divorce is at the suit of the husband, very different considerations must arise with respect to the conduct of the parties, and the right of the woman to any maintenance at all at the hand of the husband.³

Settlement
of
damages.

By the 33rd section of the Divorce Act, when

² *Rawlins v. Rawlins*, 4 S. & T. 158; 34 L. J. 147.

In *George v. George*, 38 L. J. 34, the wife had obtained a decree *nisi* on the grounds of cruelty and adultery. During coverture she had become entitled to a small estate of inheritance, the rents of which amounting to £45 per annum, her husband continued to receive. On the decree being made absolute, the Court ordered that he should pay her an annuity of £30, to be secured on the property, and to cease if at any time she should recover the property from him.

³ See *Ratliffe v. Ratcliffe & Anderson*, 1 S. & T. 474, where the Court, considering all the circumstances and the very limited income of the petitioner, refused to make any order.

damages have been assessed against the co-respondent, the Court has power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife.

In *Keats v. Keats and Montezuma*,⁴ the wife having under a marriage settlement the interest after her husband's death of £10,000, and a power to dispose of one-fifth of that sum by will; the Court directed the husband to secure her an annuity during his life of £150, *quamdiu casta vixerit*, on condition of her giving up the power of disposal of the £2000; and with respect to the damages (£1000), directed that sum to go, first, in payment of Mrs. Keats' costs; then to Mr. Keats' costs; and the surplus, if any, in satisfaction of the annuity to be paid to Mrs. Keats.

In *Bent v. Bent and Footman*,⁵ the wife having, on her marriage, had a fortune of £1,678, which was not settled but was received by the husband, the Court made an order that he should settle £1000 upon trust that the interest be applied for the benefit of the wife so long as she conducted herself properly and remained unmarried, and that upon her interest ceasing, the fund should be held in trust for the children of the marriage in equal shares; that the £1000 damages awarded against the co-respondent should be paid to the husband in lieu

⁴ 1 S. & T. 334.

⁵ 2 S. & T. 392.

of the sum he would have to settle; and that the decree should be suspended until the settlement should be made.

In *Callwell v. Callwell and Kennedy*,⁶ the Court directed that of the sum of £3000, damages—to be placed in the hands of trustees—£1500 should be expended in the purchase of an annuity for the respondent without power of anticipation; that the other £1500 should be invested in the funds, the interest to be paid to the respondent for her life, and the principal after her death to be paid to her child born after her separation from the petitioner.

In *Narracott v. Narracott and Hesketh*,⁷ the Court being dissatisfied with the petitioner's conduct towards his wife—cruelty had been alleged by the co-respondent, but not satisfactorily proved—directed—on pronouncing the decree *nisi*—that the damages, £2,500, should be settled on the respondent "*dum casta vixerit*,"⁸ and for life; and that after her death, or on breach of this condition, the fund should devolve on the two children of the marriage.

In *Forster v. Forster and Berridge*,⁹ the decree having been made absolute, the Court "directed

⁶ 3 S. & T. 259. See this case again, post, p. 260.

⁷ 3 S. & T. 408; 33 L. J. 132.

⁸ On the decree being made absolute, the Court refused to amend the order by inserting "*et sola*," as those words ought to have been suggested at the time the order was made.
4 S. & T. 76; 34 L. J. 54.

⁹ 3 S. & T. 158; 32 L. J. 206.

that the sum of £5000, being the damages assessed in this cause, be paid to the petitioner's solicitor, to be by him applied in the following manner:— that £1000 be paid to the petitioner for his own use; that an annuity for £120 a year be bought in the names of two trustees on the life of the respondent, and that such annuity be paid by the trustees to the respondent so long as she shall lead a moral and respectable life; but should the respondent not lead a respectable and moral life, then that her interest in the annuity should be forfeited, and that the trustees should pay such annuity to the two daughters of the marriage, in equal portions, or to the survivor of them; and that the residue of the said sum should be invested in the purchase of equal annuities for the use of the two daughters of the marriage on their own lives; and that a deed should be prepared and settled by one of the conveyancing counsel of the Court of Chancery, whereby this order should be effectually carried out through the intervention of trustees, and anticipation of the annuities should be prevented.”¹

¹ After this order was made, the petitioner was put to further expense by appeals, &c., and an agreement was then come to by the petitioner and the co-respondent that the litigation should cease; that the co-respondent should pay the petitioner £2,700; that the co-respondent should secure the respondent an annuity of £120 while she lived respectably, and that the petitioner should release the co-respondent from the £5000 damages and costs. The Court refused to sanction this agreement, as it injuriously affected the interests of the

Damages are not however always settled for the benefit of the wife, and though in many cases it is no doubt only just that the pecuniary recompense extorted from the man for the injury he has done in depriving the woman of her home should be applied to her maintenance; the Court may, according to the circumstances—as where the wife's misconduct has been very gross—direct the damages to be settled for the benefit of the children, if any, or to be paid to the petitioner.

In *Clark v. Clark* and *Bouck*,² the damages having been assessed at £250—and not being likely to be paid—the Court directed that the petitioner should assign all his interest in them to a trustee on behalf of the only child; and in case of the child's death under the age of twenty-one and unmarried, that they should revert to the petitioner.³

The application to the Court to give directions respecting the settlement of the damages is usually

respondent and the children, but so far varied the original order as to allow the petitioner to take a larger share of the damages, on the ground that the main intent of the Court had been to reimburse the petitioner the whole expense to which he had been put. *Forster v. Forster & Berridge*, 4 S. & T. 131; 34 L. J. 88.

² 2 S. & T. 520.

³ In *Taylor v. Taylor & Wolters*, 39 L. J. 23, damages having been assessed at £150, the Court would not order any part to be settled upon the respondent, but directed them to be applied first to the payment of such part of the petitioner's costs as he should not recover from the co-respondent, and the remainder to be settled upon the child.

made on the motion to make the decree absolute;⁴ but where it was proved that at the time of the hearing of the cause the respondent was living with the co-respondent, the Court made an order for the payment of the damages to the petitioner—there being no issue of the marriage—part of the decree *nisi*.⁵

⁴ Though there is nothing to preclude the Court from settling the damages after the decree has been made absolute. *Bellingay v. Bellingay & Thomas*, L. R. 1 P. & D. 168.

⁵ *Evans v. Evans & Bird*, L. R. 1 P. & D. 36.

CHAPTER VII.

Settlement of Property to which a Wife is entitled in Possession or Reversion—Marriage Settlements—Costs.

THE subjects next to be considered are; first, the power of the Court, when a divorce or judicial separation is decreed by reason of the wife's adultery, to divert from her any property, to which she is entitled in possession or reversion, in favour of the innocent parties; secondly, Its power to vary marriage settlements in like manner, at the suit of either party.

Statutable
provisions.

By the 45th section of the Divorce Act, in any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as It shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them.¹

¹ The 6th section of 23 & 24 Vict. c. 144, after reciting the above section, enacted that any instrument executed pursuant to any order of the Court made under the said enactment before or after the passing of this Act, at the time of or after the pronouncing of a final decree of divorce or judicial separation, shall be deemed valid and effectual in the law notwith-

The Court having held that under the above ^{22 & 23} section, It could not deal with marriage settlements, ^{Vict. c. 61,}
the power of doing so was conferred by the 5th ^{s. 5.}
section of 22 & 23 Vict. c. 61, which enacted that the Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree; and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit.²

standing the existence of the disability of coverture at the time of the execution thereof.

² As to the mode of proceeding under the above provisions see Rules 95, and 97 to 103 in Appendix.

The petition may be filed as soon as the final decree—that is, in a suit for dissolution of marriage, the decree absolute—has been pronounced. According to the property to be dealt with, it may be under either or both of the above sections. In form, it should state shortly in separate paragraphs, the proceedings in the cause, the ages of the children, if any, then recite the provisions of the will or settlement material to the case, and conclude with a prayer to the Court according to the alteration desired to be made in such provisions. See Rules 97 to 100. The pleadings, when completed, are in the first instance referred to one of the Registrars, before whom the parties interested attend, and who makes his report accordingly; and the matter is then brought before the Court on motion to confirm or vary the report. See Rules 101, 102. Notice of the motion must be given to the parties interested, whether they have attended before the Registrar or not.

If any suggestion is made that the order does not carry out the intention of the Court, It may, in accordance with the

It will be most convenient to state the cases and the construction put upon the above sections in their order.

Settlement
of wife's
property
under s. 45
of Divorce
Act.

In *Seatel v. Seatel*,³ a judicial separation having been decreed on the ground of the wife's adultery, the Court ordered that the trustees, in whom the property to which the wife was entitled was vested, should pay over £80 per annum, a moiety of her income, to the trustees named by the petitioner to be applied by them to the maintenance and education of the children of the marriage.⁴

In *Bacon v. Bacon and Bacon*,⁵ it appearing that under the trusts of certain wills, the respondent would be in receipt of one-sixth of an income of upwards of £600, arising out of real property, with power to dispose thereof; the Court directed that two-thirds should be settled on the children—two sons and a daughter aged respectively nine, seven, and five years—immediately, and the remaining third after the mother's death.

In *Carstairs v. Carstairs, Dickenson and others*,⁶

practice of the Court of Chancery, reopen and rehear the matter with the view of doing what justice may require. See *Cavendish v. Cavendish & Rochefoucauld*, 38 L. J. 13.

³ 4 S. & T. 230: s.c. as *Seatl v. Seatl*, 30 L. J. 216.

⁴ In this case the Court held that It could not interfere in the power of appointment vested in the wife. Again, in *Davies v. Davies & M'Carthy*, 37 L. J. 17, an application under 22 & 23 Vict. c. 61, s. 5, the Court refused to sanction an agreement between the parties whose marriage had been dissolved that the power of appointment given to the respondent in the settlement should be extinguished, and refused to make any order affecting the appointment of trustees.

⁵ 2 S. & T. 86.

⁶ 3 S. & T. 538.

the respondent, who was proved to have been guilty of very gross misconduct, and had put the petitioner to great expense by opposing the petition, became entitled in possession after the decree *nisi*, but before it was made absolute, to about £500. The Court, however, declined to deprive her of any portion of the fund in favour of the petitioner, as it was all that she had to live upon.

An interest under a marriage settlement which may never be realized is not property in "reversion" with which the Court can deal under the 45th section of the Divorce Act.⁷

In *Milne v. Milne and Fowler*,⁸ the respondent under the will of her father had a life interest to her separate use in certain property, unless she, being discovert, should do or suffer any act or thing, or any event should happen, whereby the same income or any part thereof should either voluntarily or involuntarily be aliened or incumbered or be receivable otherwise than by herself personally, in which case the trust for her benefit was to be void, and such annual income was to be applied for the benefit of the respondent or her children at the discretion of the trustees. The Court ordered a settlement to be made out of the respondent's life income derived from her father's will in favour of the petitioner and his children, but refused to extend the order to any moneys the trustees in their discretion might think proper to

⁷ See *Stone v. Stone & Brownrigg*, 3 S. & T. 372.

⁸ L. R. 2 P. & D. 295.

pay her in case the substituted trust came into operation by reason of such order; holding that such a possibility of income was not property in reversion within the meaning of the statute.

Alteration
of
marriage
settle-
ments.

The 5th section of 22 & 23 Vict. c. 61 applies only to settled property, and may be considered as supplementary to, and as a further extension of the powers given by the 45th section of the Divorce Act. Its operation is, however, limited to cases in which there is living issue of the marriage, and—though it is doubtful whether such was the intention of the Legislature, attention having probably not been directed to the legal effect of the language used—the Court has held in a series of decisions that It is bound by the proper legal interpretation of the word “parents;” that persons cease to be parents when they have no longer living issue; and therefore that It has no power to make an order with reference to settled property unless there is a child of the marriage living not only at the date of the divorce, but also at the time when the order is applied for.⁹

Separation
deed may
be dealt
with.

Where, however, the Court has the power, It is disposed to construe the section liberally, and

⁹ *Thomas v. Thomas*, 2 S. & T. 89; *Bird v. Bird*, L. R. 1 P. & D. 231; *Corrance v. Corrance & Lowe*, *Moore* intervening, * L. R. 1 P. & D. 495; 37 L. J. 44; *Graham v. Graham & Griffith*, L. R. 1 P. & D. 711.

* In this case it was held that the trustees of a settlement cannot be heard in support of an application to alter it, though they may be heard in support of the settlement.

holds that any deed—such as a separation deed¹—whereby property is settled upon a woman in her character as a wife, and to be paid to her whilst she continues a wife, comes within its scope, and may be dealt with as a settlement.²

As marriage settlements—whether ante-nuptial or post-nuptial—are generally executed for the benefit of the wife; applications respecting them most frequently arise out of suits instituted by the husband. But, whether the wife or the husband be the respondent in the cause, the Court will act upon the same principles in dealing with the settlements. It will take into consideration the conduct of the parties, their pecuniary position and that of the children, and the change effected in it by the divorce; and, having regard to all the circumstances disclosed, will make such orders as may seem most beneficial to the innocent parties by

Principles
on which
the Court
acts.

¹ *Stone v. Stone & Brownrigg*, 3 S. & T. 372; 33 L. J. 95. But, in this case, as the separation deed contained a stipulation that, in case of a dissolution of the marriage, the trusts under it should be null and void, the Court made no order, as there was no settlement to deal with.

² *Worsley v. Worsley & Wignall*, L. R. 1 P. & D. 648. In this case, the deed which the Court was asked to remodel was an ordinary deed of separation, under which the petitioner covenanted to pay the respondent £200 a year during their joint lives, to be reduced to £150 for the remainder of her life if she survived him, or £50 a year only if she married again. The Court made an order embodying the petitioner's proposal to reduce the £200 per annum by one-third and the other sums by one-half, the order to be submitted to the parties after it was drawn up, so that they might make any objection to it if so advised.

diverting the trusts of the settlement in their favour—in some cases, treating the respondent as if naturally dead,³ in others, by ordering the trustees to apply the whole or a proportion of the respondent's life interest for the benefit of the petitioner, or of the children, or both,⁴ according to the sources whence the income is derived—consistently, however, with not leaving the respondent entirely without means.

In *Callwell v. Callwell* and *Kennedy*,⁵ the Court declined to interfere with the respondent's life-estate in the interest of a sum of about £1384, to which she was entitled after the death of her father, and which was, after her death, settled upon the petitioner absolutely; but with respect to an annuity of £400, which the petitioner had, by the settlement, covenanted to pay to his wife for life in the event of her surviving him, ordered that the trustees should apply all moneys so received by

³ *Gill v. Gill & Hogg*; *Stone v. Stone & Brownrigg*, 3 S. & T. 359, 372.

⁴ *March v. March & Palumbo*, L. R. 1 P. & D. 440.

But the settlement can be varied only 'for the benefit of the children of the marriage or of their parents.' In *Sykes v. Sykes & Smith*, L. R. 2 P. & D. 163, the petitioner's father having covenanted to pay the respondent after the petitioner's death an annuity of £100 during the joint lives of himself and the respondent, an order was made that, after the petitioner's death, the annuity should be applied for the benefit of the only child of the marriage; but the Court held that It had no power to deprive the respondent of the annuity in the event of her surviving the child.

⁵ 3 S. & T. 259. See this case ante, p. 250.

them under the covenant to the maintenance and education of the children of the petitioner and respondent born previously to the separation.

When the alteration of a settlement is applied for in favour of a child in the custody of the father, the Court may require full information of the father's means. In *Webster v. Webster and Mitford*,⁶ the petitioner had no property except £500, realized by the sale of his commission as a lieutenant in the army: the respondent was entitled to a life-interest in about £2,900 consols, which sum she had brought into settlement. The Court ordered £20 a year to be paid by the trustees of the settlement during the respondent's life out of the dividends received by them on the settled property, to the paternal grandfather for the benefit of the child.

The Court will not, at the prayer of the wife who has been found guilty of adultery, deprive the husband of the benefit he takes under a settlement, whether for the benefit of the children or not.

In *Thompson v. Thompson and Barras*,⁷ it appeared that Mrs. Thompson had become entitled in 1859, to a life-interest in certain hereditaments, with remainder to her children. As this interest was not secured to her separate use, her husband the petitioner became entitled during their joint lives, *jure mariti*. For some years previously the parties had been living separately, and after some

⁶ 3 S. & T. 106; 32 L. J. 29.

⁷ 2 S. & T. 649; 32 L. J. 39.

negotiation, a deed of settlement was made in 1860, by which the property was conveyed to trustees, on trust to pay, during their joint lives, one half of the proceeds to Thompson, and the other moiety to Mrs. Thompson, "until the said Mary Ann Thompson shall commit any act of adultery, and the trustees for the time being acting in the trusts, &c. shall declare by writing under their hands that they have received evidence thereof," &c. from and after which time the trustees to pay Mrs. Thompson's moiety to Elizabeth, the daughter of the parties. The trustees had acted upon this provision, and given notice that they intended to pay Mrs. Thompson's moiety to the daughter, who it appeared had refused her father's offer of a home, and continued to live with her mother and Barras. The Court refused to make an order that the moiety payable to the petitioner should be applied to the use and benefit of the daughter.

Alteration
in favour
of peti-
tioner.

On the other hand, where the petitioner has but a small income, and the respondent is a woman of considerable fortune, the Court will, in dealing with the settlement, be disposed to allot to the petitioner such a portion of her settled property as would place him in a position somewhat equivalent to that he would have occupied had the married status of the parties continued. The amount so to be allowed must, in each case, be a matter of discretion; but the principles on which the Court will act were clearly stated by the Judge Ordinary in *March v. March* and *Palumbo*.⁸ "The first consi-

⁸ L. R. 1 P. & D. p. 442.

deration will be : what is the nature and extent of the pecuniary change operated by the wife's criminality? The Court will look at the probable pecuniary position which the parties and their children would have occupied if the marriage which the settlement contemplated had been a binding union, and the parties had lived in harmony together upon their joint incomes. If this union has been broken and the common home has been abandoned by the criminality of the one without fault in the other, it seems just that the innocent party should not, in addition to the grievous wrong done by the breach of the marriage-vow, be wholly deprived of means, to the scale of which he may have learnt to accommodate his mode of life; nor, viewing the matter on the other side, does it seem either just or equitable that funds which were intended at the time of the marriage for the use of both should be borne off by the guilty party, and perhaps transferred to the hands of the adulterer as the dowry of a second marriage. The interests of society point in the same direction. It would be of evil example if this Court were to decide that the entire fortune of a wealthy married woman was to be reckoned as part of the prospects of an adulterer, or the resources of a second home for a guilty woman."⁹

⁹ Yet this is inevitably the consequence of the Court being unable to deal with the settlement where there is no issue of the marriage : so that a woman, towards whom the co-respondent may have been attracted chiefly by her marriage settlement, is enabled after her marriage has been dissolved on

In this case the joint annual income of the parties amounted to £1718—£260 being derived from the petitioner's official appointment, £1458 from property brought into settlement by the respondent, or bequeathed to her separate use by her mother. The Judge Ordinary ordered to be paid out of the income of the respondent's settled property £200 per annum to the petitioner during the minority of the son of the marriage for his maintenance and education, and on his attaining his majority, to the son himself; and £440 per annum to the petitioner during the joint lives of himself and the respondent.

On appeal from this order, the Full Court held that where an allowance is ordered to be paid for the benefit of a child of the marriage, it should be paid to the father so long only as the child is in his custody; that the fact that the original order did not give such a direction was not a ground of appeal, as the Judge Ordinary would have so framed it had he been applied to for that purpose at the time it was made; and that he had, in making the allowance, exercised his discretion on right principles and in an equitable manner.

Order not
retrospec-
tive.

The order is not retrospective, and therefore the alteration in the destination of the settled property takes effect only from the date of the order. In *Paul v. Paul* and *Farquhar*,⁹ the father of the respondent had settled property in the first place for the

account of her adultery, to share with the partner of her guilt, funds which may have been brought into settlement partly or even wholly by her husband.

⁹ L. R. 2 P. & D. 93.

benefit of his daughter for life, then for the benefit of the husband, and on the death of the survivor, for the benefit of the children. The marriage having been dissolved, and the respondent having since married the co-respondent, the Court varied the settlement by ordering the whole income of the settled property to be applied during the joint lives of the petitioner and respondent for the benefit of the children; but held that It had no authority to alter the destination of dividends due and payable before the date of the order.

When the marriage is dissolved by reason of the husband's misconduct, the Court will deprive him of any interest he may take in the income of the wife's money under the settlement. In *Boynton v. Boynton*,¹ it appeared that the husband had eloped with the petitioner when a minor, she being entitled under the will of her father to about £19,000 stock; and that by a post-nuptial settlement, two-thirds of the income of her property were settled to her use for life, one-third to her husband, with benefit of survivorship respectively, and after the death of the survivor, for the children. The Court directed that, till further order, what would be paid to him should be paid to the mother—to whom It gave the custody of the child—and in the event of his surviving her, the whole to the child.

In *Chetwynd v. Chetwynd*,² the Court having estimated the total income of the husband at

¹ 2 S. & T. 275.

² L. R. 1 P. & D. 39.

£1,159—part of it being derived from settled property to which the wife had contributed £3000—ordered that £200 a year should be paid out of the settled property to the persons who were intrusted with the custody of the children of the marriage, for their maintenance and education; and taking into consideration the fact that the wife was not free from blame, and that she had contracted debts to the amount of about £3000 previously to the separation, which the husband was liable to pay, and also the expense he had incurred by reason of the suit for dissolution, further ordered that £250 a year out of the settled property should be paid, during the respondent's life, to the petitioner, *dum sola et casta vixerit*.

After
death of
petitioner.

As the authority of the Court to deal with settlements does not arise till after the final decree, if the petitioner dies before the decree can be made absolute, the suit abates, and no other person can intervene to get the decree made absolute;³ but, if the petitioner dies after the decree has been made absolute, the guardian of the children may then present a petition for an order to vary the trusts of the settlement.⁴

In *Smithe v. Smithe* and *Roupell*,⁵ the petitioner, who died after the decree dissolving his marriage

³ *Grant v. Grant & others*, 2 S. & T. 522.

⁴ *Ling v. Ling & Croker*, 4 S. & T. 99; 34 L. J. 52.

⁵ L. R. 1 P. & D. 587.

It was, in this case, decided that an executor of a deceased petitioner cannot, as such, petition for an alteration of the settlements, and that the guardian of the minor children is the proper person to do so.

had been made absolute, had by his will excluded some of his children from participation in certain property over which he had a power of appointment under his marriage settlement, but thereby he secured to them a reasonable maintenance out of his general estate. The Court, in dealing with the settlement, extinguished the respondent's life-interest in her husband's property, but refused to compel her, out of her separate income and estate, which was not large, to increase the portions of such children, in order to place them more nearly on an equality with the other children.

The costs of an application to vary a marriage settlement may be thrown on either of the parties according to the circumstances of the case. ^{Costs.}

In *Bird v. Bird*,⁶ the wife's suit, the Court directed her costs to be paid by the respondent as it was a fair question for argument, but made no order as to the costs of the trustees; and again in *Corrance v. Corrance and Lowe*,⁷ the Full Court being of opinion that the question was a proper one to be argued, made no order as to costs; but in *Graham v. Graham and Griffith*,⁸ the petition was dismissed with costs.

In *Boynton v. Boynton*,⁹ the wife's suit, the Court made no order as to the costs, as she had the whole income.

⁶ L. R. 1 P. & D. 231: ante, p. 258, *in notis*.

⁷ L. R. 1 P. & D. 495: ante, p. 258, *in notis*.

⁸ L. R. 1 P. & D. 711: ante, p. 258, *in notis*.

2 S. & T. 275: ante, p. 265.

In *Ling v. Ling and Croker*,¹ the guardian was held entitled to his costs of the petition.

A co-respondent, when condemned in costs, is liable to the costs of altering a settlement, as such alteration is a consequence of his misconduct;² but if part of an application to deal with settlements is granted, and part fails, the costs of that part which fails will not be cast upon him, if they can be separated from the successful part.³

In *Smithe v. Smithe and Roupell*,⁴ the costs of the petitioner and trustees were ordered to be paid by the co-respondent.

¹ 4 S. & T. 99 : ante, p. 266, *in notis*.

² *Gill v. Gill & Hogg*, 3 S. & T. 359.

³ *Stone v. Stone & Brownrigg*, 3 S. & T. 372.

⁴ L. R. 1 P. & D. 587 : ante, p. 266.

CHAPTER VIII.

Custody of Children—Custody of, or Access to Children pending the Suit : On final Decree : After final Decree—Intervention by third persons.

By the 35th section of the Divorce Act, In any ^{Statutable provisions.} suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the Court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree as It may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery.

By the terms of this section, the Court had no power to modify an order made on the final decree, and, therefore, in some cases declined to make any order;¹ but, now, by the 4th section of 22 & 23 Vict. c. 61, The Court, after a final decree of judicial separation, nullity of marriage, or dissolu-

¹ As in *Robotham v. Robotham*, 1 S. & T. 190, where the children were with the mother, the petitioner ; and the father was in America.

tion of marriage, may, upon application, by petition, for this purpose make, from time to time, all such orders and provision with respect to the custody, maintenance and education of the children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery as might have been made by such final decree or by interim orders in case the proceedings for obtaining such decree were still pending.³

Power of
the Court
under
above
sections.

Under the above provisions, the Court possesses very extensive discretionary powers, exceeding those exercised by the Courts of Law and Equity, with respect to the custody, maintenance, and education of the children of the parties whose marriage is the subject of a suit for judicial separation, dissolution of, or nullity of marriage, as well during the pendency of the suit, as after the final decree; and may from time to time vary its orders respecting them as circumstances may require. Its jurisdiction over them is limited to the period at which the parents' right to control ceases, which has been

³ As to applications under the former section, see Rule 104 in Appendix.

In suits for dissolution of marriage, orders respecting the children between the decree *nisi* and the decree absolute are interim orders.

When the permanent custody of the children is intended to be asked for on the final decree, or on a decree of judicial separation, a prayer to that effect should be embodied in the prayer of the petition. *Seymour v. Seymour*, 1 S. & T. 332.

Any application after the final decree must be by a separate petition.

fixed by the Court of Queen's Bench at the age of sixteen years.³

First: As to the custody of or access to the children pending the suit. Pending
the suit.

The application must be made on motion to the Court founded on the affidavits of the parties, or of their relatives or friends in whose custody the children are, or in whose custody it may be desired to place them; but the Court will not do anything tending to prejudice the main issues in the suit, and therefore will not allow affidavits to be read touching the truth or falsehood of the charges brought by the parties against each other.⁴ It will consider only the circumstances of the application before it—the ages of the children, their position in relation to other members of the family—and in its discretion, will make such orders as may appear to be most convenient to all the parties concerned, and above all, most conducive to the welfare of the children. Where they appear to be in proper custody—as, for instance, at a good school in England or abroad, or under the care of a relative friendly to both parties⁵—the Court will be very

³ *The Queen v. Howes*, 30 L. J. (M. C.) 47. On this authority, the Judge Ordinary, in the case of *Mallinson v. Mallinson*, L. R. 1 P. & D. 221, ruled as stated in the text; but until this decision, no order had been made by the Court of Divorce as to the custody of a child above the age of fourteen.

⁴ *Ryder v. Ryder*, 2 S. & T. 225.

⁵ In *Curtis v. Curtis*, 1 S. & T. 75, the wife's suit on the ground of her husband's cruelty, the Court ordered that the two elder children, aged nine and eight years respectively, should remain in the custody they were then in—that of an

reluctant to disturb them; but as It has power to make an order for access only,⁶ It will, according to the circumstances, gratify the natural affection of the parents for their children by allowing either party, as the case may be, to have reasonable access, provided that such access would not be productive of injury to them. The access allowed is usually once a week or once a fortnight, sometimes with the condition that the visit shall be in the presence of some third person.

The
father's
right.

The father is, *primâ facie*, entitled at common law to the custody of his child, however young,⁷ and the Court will exercise its discretionary power with reference to that right, and will adhere to, or depart from, the common law rule according to the circumstances of the case.⁸

old governess of the family—the youngest child, aged five years, to remain with the mother; in both cases, the father to have reasonable access, and their residence not to be changed without giving him notice.

In *Boynton v. Boynton*, 1 S. & T. 324, the wife left her husband's house, with the view of instituting a suit for dissolution on the grounds of his adultery and cruelty, taking with her their boy, between seven and eight years of age, whom she placed in a school kept by an intimate friend of her own. On application for an interim order to prevent the father removing him from the school, the Court ordered the child to be given up to the husband's mother, who from her letters appeared to be on good terms with her daughter-in-law, and attached to the boy.

⁶ *Thompson v. Thompson & Sturmfells*, 2 S. & T. 402.

⁷ *The Queen v. Clarke*, 7 Ell. & Bl. 186.

⁸ In *Spratt v. Spratt*, 1 S. & T. 215, where it appeared from the affidavit of the husband that the mother was leading an

In *Carlidge v. Carlidge*,⁹ the wife, petitioner in a suit for judicial separation, had departed from her husband's house, leaving her child, seven months old, behind her. Application being made on the part of the mother to have the child given up to her, it appeared from the affidavits that the child was as healthy and as thriving as when the mother was with it, and there was no proof that the mother's health was injured, or that she was capable of suckling it. The Court rejected the motion, but only on condition of an undertaking being given by the husband not to remove the child without the sanction of the Court; the mother to have reasonable access to it.

But in *Barnes v. Barnes and Beaumont*,¹ the mother, respondent in a suit for dissolution of marriage, was allowed to have the custody of her two infant children—the one between three and four years of age, the other eighteen months—on the ground that she was suffering in her health from being deprived of their society, and that they were living with a stranger, and not with the father.

The wife has not an actual right to an order for access to her children, and where such access would be incompatible with the convenience of the

No actual
right of
access.

abandoned life, the Court ordered that the elder child, aged seven years, should be delivered to the father; the younger child, aged four years—as there was no fear of its being contaminated by the alleged conduct of the mother—to remain with her friends, she undertaking not to remove it.

⁹ 2 S. & T. 567.

¹ L. R. 1 P. & D. 463.

parties, or would be productive of injury to the children, or where the application appears not to be made *boná fide*, the Court may refuse to make any order; as in *Codrington v. Codrington and Anderson*,³ where the father having removed his two children—girls, aged respectively about twelve and eleven years—from their mother's custody, instituted a suit for dissolution of marriage, and then took the children with him to Gibraltar. The mother contented herself for some months with an arrangement into which she had entered with the petitioner's solicitors for corresponding with her children; and then moved for an order for access to them—substantially, for an order on the father to bring or send them to England. Under the circumstances, the Full Court, on appeal, confirmed the refusal of the Judge Ordinary to make any order.

Orders on
final
decree.

Although, as I have stated, the Court will not, by its *interim* orders respecting the children, prejudice the merits of the cause; It will, in its order made on the final decree, take into consideration the merits and demerits of the parents as disclosed at the hearing; and will give the custody of the children—having regard to their ages, and subject to further orders—to the parent who seems best qualified to take charge of, and maintain them.

Therefore, although the common law right to their custody is in the father; yet, where the wife is the successful suitor, and is free from blame,

³ 3 S. & T. 496.

she is generally held entitled to have the charge of her children, partly for their benefit, and partly on the ground that she ought not to obtain her decree at the expense of losing the solace of their society.³

In *Marsh v. Marsh*,⁴ the Court, in pronouncing a decree of judicial separation at the suit of the wife on the ground of the husband's cruelty, was of opinion that, although it did not appear that he was ever guilty of any cruelty or unkindness to his children,—a girl aged seven, a boy aged four, and two girls younger—it was just and proper that they should remain in the custody and under the control of their mother so long as she had the means of giving them a suitable education and the inclination to do so. “I therefore make it part of my decree that the children shall remain in the custody and under the control of their mother until the age of fourteen, provided she keeps and maintains at school such of them as are of a fit age to be sent there, without subjecting her husband to expense. The husband always to have information of the schools at which they are placed, and to have the same access to them there as is allowed to the parents of other children at the same schools. As long as any one of them is kept by its mother at her home, as being too young to be sent to

Decision of
Sir C.
Cresswell.

³ But, for this reason, the Court declined to interfere with the custody of an *idiot* boy, aged twelve years, and refused to order him to be delivered up to the mother, holding that it was a question more properly belonging to the Court of Chancery *Cooke v. Cooke*, 3 S. & T. 248.

⁴ 1 S. & T. p. 316. See ante, Cruelty, p. 90.

school, the respondent to have access to it there once a week at any reasonable hour."

In *Suggate v. Suggate*,⁵ where it appeared that the respondent, in addition to the cruelty of which he had been found guilty towards his wife, was a man of immoral habits, the Court ordered that the children—three sons, aged respectively nine, six, and two, and one daughter aged four years—should be kept in the custody of the mother until they respectively attained the age of fourteen years; the father to be kept informed from time to time of the places where the children were residing, and to have access to them once a week for two hours between 10 a.m. and 4 p.m., in the presence of some person to be appointed for that purpose by the petitioner.

In *Boynton v. Boynton*,⁶ on a decree of dissolution on the grounds of the husband's adultery and cruelty, the Court held that it would not be just to leave the custody of the child—a boy, about ten years of age—in the father, as the marriage had been dissolved by reason of his misconduct, the wife not having been to blame, and therefore directed that the mother should have the custody of the child till further order, with provision for reasonable access by the father; the child not to be taken out of the jurisdiction of the Court without leave.

Order for
main-
tenance.

In some cases, the Court will make an order upon the husband for the maintenance only of the children.

⁵ 1 S. & T. p. 496.

⁶ 2 S. & T. 275.

In *Milford v. Milford*,⁷ the wife having obtained a judicial separation on the ground of her husband's adultery, and also the custody of their two children (girls) until the Court should otherwise direct, presented a further petition praying the Court to order the respondent to pay her a sum or sums of money for the past and future maintenance of the children. The respondent, in answer, asked the Court to order the children to be delivered up to his father and sister, who were prepared to provide for their maintenance and education. The Court refused to take the children from the custody of their mother, who appeared to have been wholly blameless, and made an order on the respondent to contribute a certain sum per annum towards their maintenance.

It may unfortunately happen that neither parent is fit to be intrusted with the custody of the children: in such cases, the Court has construed liberally the obvious intention of the Legislature that It should have the power to make such orders as it may deem "just and proper" for the benefit of the children themselves; and with this view, the Court will not merely decide on the rival claims of the parents, but will entertain the application of third parties who may think proper to intervene and ask for the custody of the children. Such intervention must be in the form of a petition, supported by affidavits of the facts on which it is based.

Intervention by third persons.

⁷ L. R. 1 P. & D. 715.

In *Chetwynd v. Chetwynd*,⁸ the decree for the dissolution of the marriage by reason of the husband's adultery and cruelty having been made absolute, the petitioner filed a petition for an order as to the custody, maintenance, and education of the two children—a girl nearly ten, and a boy about eight years of age—to which the father answered, praying leave to retain their custody. A motion was then made and granted on behalf of the uncle and aunt of the children to be allowed to intervene for their benefit. The Court being of opinion that neither the mother nor the father were, according to the evidence given at the hearing of the cause,⁹ fit to be intrusted with the care and custody of the children, committed them to the care of the interveners: the parents to have free access to them at proper times.

Where the husband is petitioner.

Even after a decree of dissolution at the suit of the husband, the Court might interfere at the instance of intervening relatives, and hold a father disqualified to have the custody of his child if he were shown to be leading a notoriously dissolute life.

But where a husband has obtained a decree dissolving his marriage, and is living and associating with respectable people, and leading to all outward appearance a respectable life; the Court will regard with great disfavour an attempt to get up a charge

⁸ 4 S. & T. 151; 34 L. J. 130; L. R. 1 P. & D. 39.

⁹ See the judgment of Lord Penzance, L. R. 1 P. & D. p. 42.

of adultery against him—with the view of depriving him of the custody of his child—by tracking him about from place to place in order to detect him in an occasional visit to a woman for an alleged immoral purpose.¹

By the 4th section of 2 & 3 Vict. c. 54, which empowers the Lord Chancellor or the Master of the Rolls to order that a mother may have access to infant children, and if such children be within the age of seven years, to order that they be delivered to and remain in her custody until attaining such age, it is enacted, That no order shall be made by virtue of this act, whereby any mother against whom adultery shall be established by judgment in an action for criminal conversation at the suit of her husband, or by the sentence of an Ecclesiastical Court, shall have the custody of any infant or access to any infant, anything herein contained to the contrary notwithstanding.

Where the wife is found guilty of adultery.

Where, therefore, a decree has been pronounced at the suit of the husband on the ground of his wife's adultery, the Court will decline to make an order for her to have access to, or custody of the children of the marriage;² but will order her to deliver up the custody of a child, rather than leave the husband to the expense of establishing his right as father at common law.³

¹ *March v. March & Palumbo*, L. R. 1 P. & D. 437.

² *Clout v. Clout & Hollebone*; *Bent v. Bent & Footman*, 2 S. & T. 391, 392.

Boyd v. Boyd & Collins, 1 S. & T. 562.

Costs

The costs of applications respecting the custody of, and access to children, may, like other costs, devolve upon either of the parties; but will not be taxed against the husband when made unnecessarily.⁴

Persons who intervene between the parents for the purpose of interfering with the custody of their children must take the risk of being condemned in the costs, should their intervention prove unsuccessful.⁵

⁴ *Boynton v. Boynton*, 2 S. & T. p. 277, where no order was made as to costs, the wife having all the income. — *Thompson v. Thompson & Sturmfells*, 2 S. & T. 402, where the wife's costs of appeal to the full Court for access only were ordered not to be taxed against the husband. In *Bacon v. Bacon*, L. R. 1 P. & D. 167, a judicial separation having been decreed on the ground of the wife's cruelty; she afterwards applied on motion for access to some of the children, and an order for access was made; but the Court would not allow the costs of the motion to be taxed against the husband, as he had not refused her access to the children since the date of the decree.

⁵ *March v. March & Palumbo*, L. R. 1 P. & D. 437.

CHAPTER IX.

Petition for Reversal of Decree of Judicial Separation—New Trial—Appeal to Full Court—Appeal to House of Lords—Right of Parties to marry again after Decree of Dissolution.

By the 23rd section of the Divorce Act, it is enacted that Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may, at any time thereafter, present a petition to the Court praying for a reversal of such decree on the ground that it was obtained in his or her absence, and that there was reasonable ground for the alleged desertion, where desertion was the ground of such decree; and the Court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly, but the reversal thereof shall not prejudice or affect the rights or remedies which any other person would have had in case such reversal had not been decreed, in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the sentence of separation and of the reversal thereof.¹

¹ For the procedure under this section, see Rules 63 to 66, and Form, No. 10, in Appendix. For the position of a wife as a *feme sole* after a decree of judicial separation, with respect to property acquired by her, and for the purposes of contract and suing or being sued, and her relation to other persons, see

The obscure meaning of the above section was illustrated by the argument to which it gave rise in the case of *Phillips v. Phillips*,³ in which case the husband had been personally served with the petition and citation at the suit of his wife on the ground of cruelty, but he did not enter an appearance nor did he appear at the hearing, and a judicial separation was decreed. A few months afterwards, the husband filed a petition for the reversal of the decree, in which he set out the circumstances under which it had been made in his unavoidable "absence;" traversed the charges in the original petition, and alleged facts tending to show that the separation between his wife and himself had not been caused by any misconduct on his part. The wife in her answer demurred to the petition and traversed it; and by the direction of the Judge Ordinary, the demurrer was argued before the Full Court.

Construction put on the section.

The Court held that the word "absence" does not mean absence without knowledge or notice of the suit, but the non-appearance of the respondent; and that the only construction which can be put on the section is, that where the respondent has not in fact appeared, he may present a petition under this section; that in his petition he must state the reasons of his absence, and the ground on which he asks to be relieved from the results of it; in other words, he must state how it happened that

ss. 25, 26 of the Divorce Act, 20 & 21 Vict. c. 85, and ss. 7, 8, 10 of 21 & 22 Vict. c. 108.

³ L. R. 1 P. & D. 169.

the decree was obtained in his absence, and he must explain the circumstances that gave rise to his absence; and that he must further state circumstances calculated to satisfy the Court that the decree was wrong. The Court may then, upon a review of all the matters alleged and proved, proceed to reverse or affirm the decree, but in coming to a decision, It will be at liberty to consider how far the absence of the petitioner was his own fault or was excusable, and whether he has taken reasonably prompt steps for his relief.³

NEW TRIAL.⁴

The principal grounds on which a new trial of a ^{Grounds} cause heard before a jury may be applied for are, ^{for.} misdirection; improper rejection or reception of evidence, or that the verdict was against the weight of evidence; and surprise. The latter are the more usual grounds, and as the propriety of granting or refusing a new trial must depend upon the facts and merits of each case, it will be useful

³ The other members of the Court concurred with the Judge Ordinary in this construction, and held that although the petition did not allege that the petitioner was absent without citation, he was absent for all the purposes of the suit; and that the petition was good on demurrer.

⁴ By s. 18 of 21 & 22 Vict. c. 108, enabling the Judge Ordinary to grant a rule *nisi* for a new trial, the rule could only be made absolute by the full Court; but as by s. 1 of 23 & 24 Vict. c. 144, all the powers and authority of the Court were vested in the Judge Ordinary alone, rules for new trials were thenceforth argued before him, and by s. 2 of that Act, "either party dissatisfied with the decision of such Judge

only to state the principles which the Court has laid down for Its guidance.

Reasons
for
granting
or
refusing.

The presumption is always in favour of the verdict, and unless it appears that the jury were actuated by passion, prejudice, or mistake, and improperly received or rejected any evidence, the Court is very unwilling to set it aside. A new trial therefore will not be granted merely because the Judge might have been of a different opinion: he must be able to go further and say that the jury were wrong, and that he is clearly dissatisfied with the verdict.⁵

sitting alone in granting or refusing any application for a new trial which by virtue of this Act he is empowered to hear and determine may within fourteen days after the pronouncing thereof, appeal to the full Court, whose decision shall be final." The Court has no power to extend the time so limited for appealing from Its refusal to grant a new trial. *Boulting v. Boulting*, 33 L. J. 81.

The application for a new trial may be made within fourteen days after the trial of the cause—see Rule 62 in Appendix—but the time may under circumstances, and by leave of the Court, be extended. With the notice of motion, a case must be filed stating the proceedings had in the cause, the grounds on which the application is founded, and praying that a new trial may be had. Any affidavits which may be necessary should also be filed with the papers for motion.

On appeal from a refusal of the Judge Ordinary to grant a rule, the full Court will look only at the case as it was argued before him, and will not receive any new affidavits. *Hill v. Hill*, 2 S. & T. 407.

⁵ See *Miller v. Miller & Hicks*, 2 S. & T. 427; 31 L. J. 73; *Gethin v. Gethin*, the Queen's Proctor intervening, 2 S. & T. 560; 31 L. J. 57; *Stone v. Stone & Appleton*, 34 L. J. 33;

In cases of cruelty particularly, where the principal evidence is necessarily that of the parties themselves, the Court is very reluctant to disturb the verdict merely because It might have arrived at an opposite conclusion: "It must see its way very plainly and be satisfied with tolerable certainty that there has been error or miscarriage; failing that, It is bound to accept the verdict as correct."⁶

Nor is it any ground for a new trial that further evidence could be produced in confirmation of the case intended to be made at the first trial, more especially, if such evidence could with reasonable diligence have been then produced; unless there has been surprise and the proposed new testimony is in denial of some matter unexpectedly introduced on the other side.⁷

In some cases, the question has been raised as to the propriety of granting a new trial on one issue ^{Two issues.}

Codrington v. Codrington & Anderson, 4 S. & T. 63; 34 L. J. 60.

⁶ *Scott v. Scott*, 3 S. & T. p. 322.

⁷ See *Miller v. Miller & Hicks*, 2 S. & T. 427; 31 L. J. 73; *Scott v. Scott*, 3 S. & T. 319; 33 L. J. 1.

In *Gethin v. Gethin*, 2 S. & T. 560, the Court refused to grant a new trial on the affidavits of two ladies to the effect that, though they had told the truth, it was only a part of what they knew, and that they could prove much more.

But in *Jago v. Jago & Graham*, 3 S. & T. 103, on an affidavit by a witness that she had made a mistake in an important date in giving her evidence, the Court granted a new trial, being of opinion that the error, if any, was such as to have disturbed the judgment and misled the mind of the jury.

where a verdict for the petitioner on both issues would be necessary to found the relief prayed.

In *Fitzgerald v. Fitzgerald*,⁸ the wife's petition on the grounds of adultery and cruelty, a verdict having been found in favour of the respondent on both issues, the Full Court affirmed the refusal of the Judge Ordinary to grant a new trial on the question of adultery only.

Discretion-
ary bar.

If the jury determine the questions submitted to them in such a manner that the Court can found its decree, the function of the jury is sufficiently discharged. In *Narracott v. Narracott and Hesketh*,⁹ the jury were unable to agree with respect to a charge of cruelty made against the petitioner by the co-respondent, but found a verdict for the petitioner on the issue of adultery with damages. The Court refused to grant a new trial, holding that it had rightly discharged the jury from giving a verdict on the issue of cruelty, as it was a question for the opinion of the Court under the 31st section of the Divorce Act.

Inconsis-
tent ver-
dict.

Nor is an inconsistent verdict necessarily a ground for a new trial; unless it be such as to prevent the Court from ascertaining the substantial opinion of the jury.¹

⁸ 3 S. & T. 400. See also *Carlidge v. Carlidge*, 3 S. & T. 406; 32 L. J. 126.

⁹ 3 S. & T. 408; 33 L. J. 132.

¹ See *Ellyatt v. Ellyatt, Taylor & Halse*, 3 S. & T. 503; 33 L. J. 137, where the jury found adultery, connivance on the part of the petitioner, and assessed damages against the co-respondent at £50. The Court refused to grant a rule for a new trial.

The question of costs must depend upon all the circumstances of the case.²

APPEALS.

The right of appeal from a decision of the Judge ^{Appeal to full Court.} Ordinary upon any matter which under the provisions of the Divorce Act he was empowered to hear alone, lies within three months from the pronouncing of such decision³ to the Full Court, whose decision is final.⁴

By the 3rd section of 31 & 32 Vict. c. 77, either ^{To the House of Lords.} party dissatisfied with the final decision of the Court on any petition for dissolution or nullity of marriage, may within one calendar month after the pronouncing thereof appeal therefrom to the House of Lords, and on the hearing of any such appeal the House of Lords may either dismiss the appeal or reverse the decree, or remit the case to be dealt with as the House of Lords shall direct: Provided

² See *Nicholson v. Nicholson & Ratcliffe*, 3 S. & T. 214; 33 L. J. 114, where the wife obtained a new trial and then produced evidence which satisfied the Court and the jury that the petitioner's case, charging her with adultery, was false, and a verdict was given in her favour: the husband was ordered to pay the costs of both trials.

See also *Stone v. Stone & Appleton*, 34 L. J. 33.

³ Except on appeal in respect of a new trial, as to which, see ante, p. 284, *in notis*.

⁴ S. 55. For the procedure on appeals to the full Court, see Rules 77 to 79, and Form, no. 11 in Appendix.

Whatever may be the subject of the appeal, the facts are taken to be those proved before the Judge Ordinary, and appearing on his notes, and the appellant has to argue that those facts did not warrant the decision.

always that in suits for dissolution of marriage no respondent or co-respondent not appearing and defending the suit on the occasion of the decree *nisi* being made shall have any right of appeal to the House of Lords against the decree when made absolute, unless the Court upon application made at the time of the pronouncing of the decree absolute shall see fit to permit an appeal.

In a suit for dissolution of marriage, the appeal lies only from the decree—that is, the decree absolute—properly so called, and not from any decision upon an interlocutory matter, or from a part of such decree not relating to the dissolution.⁵

Effect of
demurrer.

A demurrer to part of an answer to a petition for dissolution of marriage which puts in issue the validity of the marriage, the other parts of the answer remaining to be determined, is an interlocutory matter which under the Divorce Act came within the cognizance of the Judge Ordinary alone, and his judgment on such a demurrer is the subject of appeal to the Full Court; but if the judgment

⁵ In *Sidney v. Sidney*, 36 L. J. 73, the husband—respondent in a suit for dissolution of marriage—appealed from the decision of the Judge Ordinary, in which an order for permanent maintenance to be secured to the wife was embodied in the decree absolute,* to the full Court. The full Court held that the appeal was to the House of Lords; but the House of Lords held that the appeal was properly to the full Court on the ground that the subject of it was not the decree of dissolution, but the order for maintenance, a matter which under the Divorce Act fell within the cognizance of the Judge Ordinary sitting alone.

* See ante, p. 247.

on a demurrer decided the whole suit, then the appeal would lie direct to the House of Lords.⁶

By the 57th section of the Divorce Act, when the time hereby limited for appealing⁷ against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death;⁸ and by the 4th section of 31 & 32 Vict. c. 77, the above section of the Divorce Act is to be read and construed

Liberty to parties to marry again.

⁶ See *Pagani v. Pagani & Vining*, L. R. 1 P. & D. 223.

⁷ Namely, three months, as provided by s. 56 of the Divorce Act, which section was repealed by s. 2 of 31 & 32 Vict. c. 77.

⁸ But by the same section it is provided that no clergyman in holy orders of the United Church of England and Ireland shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty, or censure for solemnizing or refusing to solemnize the marriage of any such person: and by s. 58, Provided always, that when any minister of any church or chapel of the United Church of England and Ireland shall refuse to perform such marriage service between any persons who but for such refusal would be entitled to have the same service performed in such church or chapel, such minister shall permit any other minister in holy orders of the said United Church, entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel.

These sections were passed to satisfy certain clerical scruples with respect to such second marriages.

with reference to the time for appealing as varied by this Act; and in cases where under this Act there shall be no right of appeal, the parties respectively shall be at liberty to marry again at any time after the pronouncing of the decree absolute.

In an undefended suit, therefore, for dissolution of marriage, the petitioner or respondent may marry the day after the decree is made absolute; but if the suit be defended, or if an appeal is permitted, they must wait until the time—one month—has elapsed for presenting the appeal, or until the appeal has been heard and disposed of.

A marriage by either of the divorced parties in the lifetime of the other within the time limited by the above provisions is null and void in law.⁹

⁹ See *Chichester v. Mure*, 3 S. & T. 223; 32 L. J. 146; *Rogers* otherwise *Briscoe v. Halmshaw*, 3 S. & T. 509; 33 L. J. 141.

CHAPTER X.

*Procedure under the Legitimacy Declaration Act, 21 & 22 Vict. c. 93.*¹

By the 4th section of the Legitimacy Declaration Act,² all the provisions of the Divorce Act, so far as the same may be applicable, are extended to applications and proceedings under this Act, by the 1st section of which it is enacted that

Any natural born subject of the Queen or any person whose right to be deemed a natural born subject depends wholly or in part on his legitimacy or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply by petition to the Court for Divorce and Matrimonial Causes, praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject or person, being so domiciled or

Application for declaration of legitimacy or validity or invalidity of marriage.

¹ This act has not, as yet, been the subject of much judicial interpretation.

² Which, by the 11th section, is to be construed as one with the Divorce Act.

claiming as aforesaid, may in like manner apply to such Court for a decree declaring that his marriage was or is a valid marriage, and such Court shall have jurisdiction to hear and determine such application and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as to the Court may seem just:

And by the 2nd section, that

Applica-
tion for
declaration
of right to
be deemed
a natural
born sub-
ject,

Any person, being so domiciled or claiming as aforesaid, may apply by petition to the said Court for a decree declaratory of his right to be deemed a natural born subject of her Majesty, and the said Court shall have jurisdiction to hear and determine such application, and to make such decree thereon as to the Court may seem just, and where such application as last aforesaid is made by the person making such application as herein mentioned for a decree declaring his legitimacy or the validity of a marriage, both applications may be included in the same petition; and every decree made by the said Court shall, except as hereinafter mentioned, be valid and binding to all intents and purposes upon her Majesty and all persons whomsoever.³

³ For a form of petition, see *Shedden v. Patrick*, 2 S. & T. 170; 30 L. J. 229.

By s. 3, every petition shall be accompanied by such affidavit verifying the same, and of the absence of collusion, as the Court may by any general rule direct. No rules specially applicable to the Act have been framed, but the rules and

By the 6th section, a copy of every petition under this Act, and of the affidavit accompanying the same, shall, one month at least previously to the presentation or filing of such petition, be delivered to her Majesty's Attorney General, who shall be a respondent upon the hearing of such petition and upon every subsequent proceeding relating thereto.⁴

Attorney
General
must be
respon-
dent.

And by the 7th section, such person or persons (if any) besides the said Attorney General as the Court shall think fit, shall, subject to the rules made under this Act, be cited to see proceedings or otherwise summoned in such manner as the Court

Persons to
be cited.

regulations in the Appendix are, by Rule 174, so far as the same may be applicable, to extend to applications and proceedings under this Act.

A petition on behalf of an infant under the age of seven years for the purpose of obtaining a declaration of his legitimacy must be by a guardian appointed by the Court; and in such a case the Court may, in the first instance, refer the matter to the Registrar to inquire whether the proposed suit is likely to be for the benefit of the infant or not; and upon his report will determine whether the application ought to be granted. *In the matter of the petition of Chaplin*, L. R. 1 P. & D. 328.

As to the election of guardians to minors, see Rules 105 to 107, and Form No. 14 in Appendix.

⁴ The Court will not make an order for the trial by jury of a petition unless there is some issue. In *Ryves v. The Attorney General*, L. R. 1 P. & D. 23, the answer of the Attorney General did not traverse the allegations in the petition. The Court directed that subject to the Attorney General amending his answer by formally traversing the allegations, and issue being joined, the cause should be tried by a jury.

shall direct, and may be permitted to become parties to the proceedings, and oppose the application.⁵

By the 8th section, the decree of the said Court shall not in any case prejudice any person, unless such person has been cited or made a party to the proceedings, or is the heir-at-law or next of kin, or other real or personal representative of, or derives title under or through a person so cited or made a party; nor shall such sentence or decree of the Court prejudice any person if subsequently proved to have been obtained by fraud or collusion.

And by the 10th section, no proceeding to be had under this Act shall affect any final judgment or decree already pronounced or made by any Court of competent jurisdiction.⁶

⁵ The Court will not decide who are the persons to be cited until the petitioner asks leave to cite them, and shows that they are fit to be cited; nor will a person be allowed to intervene upon his own application who has not been cited, and has no interest in opposing the petition. *Upton v. The Attorney General*, 32 L. J. 177.

By s. 5, in all proceedings under this Act the Court shall have full power to award and enforce payment of costs to any person cited, whether such persons shall or shall not oppose the declaration applied for, in case the said Court shall deem it reasonable that such costs shall be paid.

⁶ It has been held that as the petitioner has a right to have his case heard as between himself and the Attorney General, the parties cited *pro interesse suo*, cannot plead *res judicata* between themselves and the petitioner in bar of the proceedings, for the above section does not mean that no proceeding shall be taken to affect any former judgments, but that no proceeding to be had under this Act shall do so.

See *Shedden v. Patrick*, 2 S. & T. p. 181.

The cause is to be heard and the allegations proved by oral or documentary evidence in the same manner as in other proceedings before the Court.⁷

⁷ In *Shedden v. Patrick*, 2 S. & T. 170, it was held that declarations of members of the family in questions of legitimacy are not admissible *post litem motam* whether the *lis* be known or not known to the person making the declaration. To constitute *lis mota* for this purpose, there must be more than the existence of the state of facts on which the claim is founded, or even of litigation on kindred matters; there must have been controversy in respect of the very point in dispute as to which the evidence is tendered.

When a motion is made for an order to examine witnesses abroad, the affidavit on which the motion is founded should set out the names of the witnesses whom it is proposed to examine. *Ryves v. The Attorney General*, L. R. 1 P. & D. 23.

APPENDIX

RULES AND REGULATIONS:

FORMS :

TABLE OF FEES.

WHEREAS by an Act passed in the Session of Parliament holden in the twentieth and twenty-first years of the reign of Her present Majesty, chapter 85, it is provided that there shall be a Court of Record, to be called "The Court for Divorce and Matrimonial Causes;" and whereas by the said Act it is further provided that the said Court shall make such rules and regulations concerning the practice and procedure under the said Act as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same; and whereas by another Act passed in the Session of Parliament holden in the twenty-third and twenty-fourth years of Her Majesty's reign, chapter 144, it is enacted that it shall be lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes alone to exercise all powers and authority whatever thenceforth exercised by the full Court.

Now I, Sir James Plaisted Wilde, Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes, do revoke all rules and regulations heretofore made and issued concerning the practice and procedure in the said Court for Divorce and Matrimonial Causes, and do make the following rules and regulations in place thereof, to take effect on and after the 11th January 1866.

Dated the Twenty-sixth day of December 1865.

(Signed) JAMES PLAISTED WILDE.

RULES AND REGULATIONS
FOR
HER MAJESTY'S COURT FOR DIVORCE
AND MATRIMONIAL CAUSES,
MADE UNDER THE PROVISIONS OF

20 & 21 Vict. Cap. 85.	25 & 26 Vict. Cap. 81.
21 & 22 Vict. Cap. 108.	27 & 28 Vict. Cap. 44.
22 & 23 Vict. Cap. 61.	AND
23 & 24 Vict. Cap. 144.	21 & 22 Vict. Cap. 93.

All rules and regulations heretofore made and issued for Her Majesty's Court for Divorce and Matrimonial Causes shall be revoked on and after the 11th day of January, 1866, except so far as concerns any matters or things done in accordance with them prior to the said day.

The following rules and regulations shall take effect in Her Majesty's Court for Divorce and Matrimonial Causes on and after the 11th day of January 1866.

Petition.

1. Proceedings before the Court for Divorce and Matrimonial Causes shall be commenced by filing a petition.—See Form of Petition, No. 1, post, p. 332.

2. Every petition shall be accompanied by an affidavit made by the Petitioner, verifying the facts of which he or she has personal cognizance, and deposing as to belief in the truth of the other facts alleged in the petition, and such affidavit shall be filed with the petition.

3. In cases where the Petitioner is seeking a decree of nullity of marriage, or of judicial separation, or of dissolution of marriage, or a decree in a suit of jactitation of marriage, the Petitioner's affidavit, filed with his or her petition, shall further state that no collusion or connivance exists between the Petitioner and the other party to the marriage or alleged marriage.

Co-respondents.

4. Upon a husband filing a petition for dissolution of marriage on the ground of adultery the alleged adulterers shall be made Co-respondents in the cause, unless the Judge Ordinary shall otherwise direct.

5. Application for such direction is to be made to the Judge Ordinary on motion founded on affidavit.

6. If the names of the alleged adulterers or either of them should be unknown to the Petitioner at the time of filing his petition, the same must be supplied as soon as known, and application must be made forthwith to one of the Registrars to amend the petition by inserting such name therein, and the Registrar to whom the application is made shall give his directions as to such amendment, and such further directions as he may think fit as to service of the amended petition.

7. The term "Respondent" where the same is hereinafter used shall include all Co-respondents so far as the same is applicable to them.

Citation.

8. Every Petitioner who files a petition and affidavit shall forthwith extract a citation, under seal of the Court, for service on each Respondent in the cause.—See Form of Citation, No. 2, post, p. 333.

9. Every citation shall be written or printed on parchment, and the party extracting the same, or his or her proctor, solicitor, or attorney, shall take it, together with a præcipe, to the Registry, and there deposit the præcipe and get the citation signed and sealed.—See Form of Præcipe, No. 3, post, p. 334. The address given in the Præcipe must be within three miles of the General Post Office.

Service.

10. Citations are to be served personally when that can be done.

11. Service of a citation shall be effected by personally

delivering a true copy of the citation to the party cited, and producing the original, if required.

12. To every person served with a citation shall be delivered, together with the copy of the citation, a certified copy of the petition, under seal of the Court.

13. In cases where personal service cannot be effected, application may be made by motion to the Judge Ordinary, or to the Registrars in his absence, to substitute some other mode of service.

14. After service has been effected, the citation, with a certificate of service endorsed thereon, shall be forthwith returned into and filed in the Registry.—See Form of Certificate of Service, No. 4, post, p. 335.

15. When it is ordered that a citation shall be advertised, the newspapers containing the advertisements are to be filed in the Registry with the citation.

16. The above rules, so far as they relate to the service of citations, are to apply to the service of all other instruments requiring personal service.

17. Before a Petitioner can proceed, after having extracted a citation, an appearance must have been entered by or on behalf of the Respondents, or it must be shown by affidavit, filed in the Registry, that they have been duly cited, and have not appeared.

18. An affidavit of service of a citation must be substantially in the form, No. 5, post, p. 335, and the citation referred to in the affidavit must be annexed to such affidavit, and marked by the person before whom the same is sworn.

Appearance.

19. All appearances to citations are to be entered in the Registry in a book provided for that purpose.—See Form of Entry of Appearance, No 6, post, p. 335.

20. An appearance may be entered at any time before a proceeding has been taken in default, or afterwards, as herein-after directed, or by leave of the Judge Ordinary,

or of the Registrars in his absence, to be applied for by motion founded on affidavit.

21. Every entry of an appearance shall be accompanied by an address, within three miles of the General Post Office.

22. If a party cited wishes to raise any question as to the jurisdiction of the Court, he or she must enter an appearance under protest, and within eight days file in the Registry his or her act on petition in extension of such protest, and on the same day deliver a copy thereof to the Petitioner. After the entry of an absolute appearance to the citation a party cited cannot raise any objection as to jurisdiction.

Interveners.

23. Application for leave to intervene in any cause must be made to the Judge Ordinary by motion, supported by affidavit.

24. Every party intervening must join in the proceedings at the stage in which he finds them, unless it is otherwise ordered by the Judge Ordinary.

Suits in formâ Pauperis.

25. Any person desirous of prosecuting a suit in formâ pauperis is to lay a case before counsel, and obtain an opinion that he or she has reasonable grounds for proceeding.

26. No person shall be admitted to prosecute a suit in formâ pauperis without the order of the Judge Ordinary; and to obtain such order the case laid before counsel and his opinion thereon, with an affidavit of the party or of his or her proctor, solicitor, or attorney, that the said case contains a full and true statement of all the material facts, to the best of his or her knowledge and belief, and an affidavit of the party applying as to his or her income or means of living, and that he or she is not worth 25*l.*, after payment of his or her just debts, save and except his or her wearing apparel, shall be produced at the time such application is made.

27. Where a husband admitted to sue as a pauper neglects to proceed in a cause, he may be called upon by summons to show cause why he should not pay costs, though he has not been dispaupered, and why all further proceedings should not be stayed until such costs be paid.

Answer.

28. Each Respondent who has entered an appearance may within twenty-one days after service of citation on him or her file in the Registry an answer to the petition. —See Form of Answer, No. 7, post, p. 336.

29. Each Respondent shall on the day he or she files an answer, deliver a copy thereof to the Petitioner, or to his or her proctor, solicitor, or attorney.

30. Every answer which contains matter other than a simple denial of the facts stated in the petition, shall be accompanied by an affidavit made by the Respondent, verifying such other or additional matter, so far as he or she has personal cognizance thereof, and deposing as to his or her belief in the truth of the rest of such other or additional matter, and such affidavit shall be filed with the answer.

31. In cases involving a decree of nullity of marriage, or of judicial separation, or of dissolution of marriage, or a decree in a suit of jactitation of marriage, the Respondent who is husband or wife of the Petitioner shall, in the affidavit filed with the answer, further state that there is not any collusion or connivance between the Deponent and the Petitioner.

Further Pleadings.

32. Within fourteen days from the filing and delivery of the answer the Petitioner may file a reply thereto, and the same period shall be allowed for filing any further pleading by way of rejoinder, or any subsequent pleading.

33. A copy of every reply and subsequent pleading shall on the day the same is filed be delivered to the opposite parties, or to their proctor, solicitor, or attorney.

General Rules as to Pleadings.

34. Either party desiring to alter or amend any pleading must apply by motion to the Court for permission to do so, unless the alteration or amendment be merely verbal, or in the nature of a clerical error, in which case it may be made by order of the Judge Ordinary, or of one of the Registrars in his absence, obtained on summons.

35. When a petition, answer, or other pleading has been ordered to be altered or amended, the time for filing and delivering a copy of the next pleading shall be reckoned from the time of the order having been complied with.

36. A copy of every pleading showing the alterations and amendments made therein shall be delivered to the opposite parties on the day such alterations and amendments are made in the pleadings filed in the Registry; and the opposite parties, if they have already pleaded in answer thereto, shall be at liberty to amend such answer within four days, or such further time as may be allowed for the purpose.

37. If either party in the cause fail to file or deliver a copy of the answer, reply, or other pleading, or to alter or amend the same, or to deliver a copy of any altered or amended pleading, within the time allowed for the purpose, the party to whom the copy of such answer, reply, or other pleading, or altered or amended pleading, ought to have been delivered, shall not be bound to receive it, and such answer, reply, or other pleading shall not be filed, or be treated or considered as having been filed, or be altered or amended, unless by order of the Judge Ordinary, or of one of the Registrars, to be obtained on summons. The expense of obtaining such order shall fall on the party applying for it, unless the Judge Ordinary or Registrar shall otherwise direct.

38. Applications for further particulars of matters pleaded are to be made to the Judge Ordinary, or to one of the Registrars in his absence, by summons, and not by motion.

Service of Pleadings, &c.

39. It shall be sufficient to leave all pleadings and other instruments, personal service of which is not expressly required by these rules and regulations, at the respective addresses furnished by or on behalf of the several parties to the cause.

Mode of Trial.

40. When the pleadings on being concluded have raised any questions of fact, the Petitioner, within fourteen days from the filing of the last pleading, or at the expiration of that time, on the next day appointed for hearing motions in this Court, or in case the Petitioner should fail to do so at such time, either of the Respondents on whose behalf such questions have been raised, may apply to the Judge Ordinary by motion to direct the truth of such questions of fact to be tried by a special or common jury.

Questions of Fact for the Jury.

41. Whenever the Judge Ordinary directs the issues of fact in a cause to be tried by a jury, the questions of fact raised by the pleadings are to be briefly stated in writing by the Petitioner, and settled by one of the Registrars.— See Form, No. 8, post, p. 337.

42. Should the Petitioner fail to prepare and deposit the questions for settlement in the Registry within fourteen days after the Judge Ordinary has directed the mode of trial, either of the Respondents on whose behalf such questions have been raised shall be at liberty to do so.

43. After the questions have been settled by the Registrar, the party who has deposited the same shall deliver a copy thereof as settled to each of the other parties to be heard on the trial of the cause, and either of such parties shall be at liberty to apply to the Judge Ordinary, by summons within eight days, or at the expiration of that time on the next day appointed for hearing summonses in this Court, to alter or amend the same, and his decision shall be final.

Setting down the Cause for Trial or Hearing.

44. In cases to be tried by a jury, the Petitioner, after the expiration of eight days from the delivery of copies of the questions for the jury to the opposite parties, or from alteration or amendment of the same, in pursuance of the order of the Judge Ordinary, shall file such questions as are finally settled in the Registry, and at the same time set down the cause as ready for trial, and on the same day give notice of his having done so to each party for whom an appearance has been entered.

45. In cases to be heard without a jury, the Petitioner shall, after obtaining directions as to the mode of hearing, set the cause down for hearing, and on the same day give notice of his having done so to each party in the cause for whom an appearance has been entered.

46. If the Petitioner fail to file the questions for the jury, or to set down the cause for trial or hearing, or to give due notice thereof, for the space of one month, after directions have been given as to the mode in which the cause shall be tried or heard, either of the Respondents entitled to be heard at such trial or hearing may file the questions for the jury, and set the cause down for trial or hearing, and shall on the same day give notice of his having done so to the Petitioner, and to each of the other parties to the cause for whom an appearance has been entered.

47. A copy of every notice of the cause being set down for trial or hearing shall be filed in the Registry, and the cause shall come on in its turn, unless the Judge Ordinary shall otherwise direct.

Trial or Hearing.

48. No cause shall be called on for trial or hearing until after the expiration of ten days from the day when the same has been set down for trial or hearing, and notice thereof has been given, save with the consent of all parties to the suit.

49. The Registrar shall enter in the Court Book the

finding of the jury and the decree of the Court, and shall sign the same.

50. Either of the Respondents in the cause, after entering an appearance, without filing an answer to the petition in the principal cause, may be heard in respect of any question as to costs, and a Respondent, who is husband or wife of the Petitioner, may be heard also in respect to any question as to custody of children; but a Respondent who may be so heard is not at liberty to bring in affidavits touching matters in issue in the principal cause, and no such affidavits can be read or made use of as evidence in the cause.

Evidence taken by Affidavit.

51. When the Judge Ordinary has directed that all or any of the facts set forth in the pleadings be proved by affidavits, such affidavits shall be filed in the Registry within eight days from the time when such direction was given, unless the Judge Ordinary shall otherwise direct.

52. Counter-affidavits as to any facts to be proved by affidavit may be filed within eight days from the filing of the affidavits which they are intended to answer.

53. Copies of all such affidavits and counter-affidavits shall on the day the same are filed be delivered to the other parties to be heard on the trial or hearing of the cause, or to their Proctors, Solicitors, or Attorneys.

54. Affidavits in reply to such counter-affidavits cannot be filed without permission of the Judge Ordinary, or of the Registrars in his absence.

55. Application for an order for the attendance of a Deponent for the Purpose of being cross-examined in open Court shall be made to the Judge Ordinary, on summons.

Proceedings by Petition.

56. Any party to a cause who has entered an appearance may apply on summons to the Judge Ordinary, or in his absence to the Registrars, to be heard on his petition touching any collateral question which may arise in a suit.

57. The party to whom leave has been given to be heard on his petition shall within eight days file his act on petition in the Registry, and on the same day deliver a copy thereof to such parties in the cause as are required to answer thereto.

58. Each party to whom a copy of an act on petition is delivered shall within eight days after receiving the same file his or her answer thereto in the Registry, and on the same day deliver a copy thereof to the opposite party, and the same course shall be pursued with respect to the reply, rejoinder, &c., until the act on petition is concluded.

59. See form of act on petition, answer, and conclusion, No. 9, post, p. 337.

60. Each party to the act on petition shall within eight days from that on which the last statement in answer is filed, file in the Registry such affidavits and other proofs as may be necessary in support of their several averments.

61. After the time for filing affidavits and proofs has expired, the party filing the act on petition is to set down the petition for hearing in the same manner as a cause; and in the event of his failing to do so within a month any party who has filed an answer thereto may set the same down for hearing, and the petition will be heard in its turn with other causes to be heard by the Judge Ordinary without a jury.

New Trial and Hearing.

62. An application to the Judge Ordinary for a new trial of issues of fact tried by a jury, or for a re-hearing of a cause, may be made by motion within fourteen days from the day on which the issues were tried or the cause was heard, if the Judge Ordinary be then sitting to hear motions, if not, on the first day appointed for hearing motions in this Court after the expiration of the fourteen days.

Petition for reversal of Decree of Judicial Separation.

63. A Petition to the Court for the reversal of a decree of judicial separation must set out the grounds on which

the Petitioner relies.—See Form of Petition, No. 10, post, p. 339.

64. Before such a Petition can be filed, an appearance on behalf of the party praying for a reversal of the decree of judicial separation must be entered in the cause in which the decree has been pronounced.

65. A certified copy of such a Petition, under seal of the Court, shall be delivered personally to the party in the cause in whose favour the decree has been made, who may within fourteen days file an answer thereto in the Registry, and shall on the day on which the answer is filed deliver a copy thereof to the other party in the cause, or to his or her proctor, solicitor, or attorney.

66. All subsequent pleadings and proceedings arising from such petition and answer shall be filed and carried on in the same manner as before directed in respect of an original Petition for judicial separation, and answer thereto, so far as such directions are applicable.

Demurrer.

67. All demurrers are to be set down for hearing in the same manner as causes, and will come on in their turn with other causes to be heard by the Judge Ordinary without a jury, unless the Judge Ordinary shall direct otherwise.

Intervention of the Queen's Proctor.

68. The Queen's Proctor shall, within fourteen days after he has obtained leave to intervene in any cause, enter an appearance and plead to the petition; and on the day he files his plea in the Registry shall deliver a copy thereof to the Petitioner, or to his proctor, solicitor, or attorney.

69. All subsequent pleadings and proceedings in respect to the Queen's Proctor's intervention in a cause shall be filed and carried on in the same manner as before directed in respect of the pleadings and proceedings of the original parties to the cause.

Showing Cause against a Decree.

70. Any person wishing to show cause against making absolute a decree nisi for dissolution of a marriage shall enter an appearance in the cause in which such decree nisi has been pronounced.

71. Every such person shall at the time of entering an appearance, or within four days thereafter, file affidavits setting forth the facts upon which he relies.

72. Upon the same day on which such person files his affidavits he shall deliver a copy of the same to the party in the cause in whose favour the decree nisi has been pronounced.

73. The party in the cause in whose favour the decree nisi has been pronounced may, within eight days after delivery of the affidavits, file affidavits in answer, and shall, upon the day such affidavits are filed, deliver a copy thereof to the person showing cause against the decree being made absolute.

74. The person showing cause against the decree nisi being made absolute may within eight days file affidavits in reply, and shall upon the same day deliver copies thereof to the party supporting the decree nisi.

75. No affidavits are to be filed in rejoinder to the affidavits in reply without permission of the Judge Ordinary or of one of the Registrars in his absence.

76. The questions raised on such affidavits shall be argued in such manner and at such time as the Judge Ordinary may on application by motion direct; and if he thinks fit to direct any controverted questions of fact to be tried by a jury, the same shall be settled and tried in the same manner and subject to the same rules as any other issue tried in this Court.

Appeals to the full Court.

77. An appeal to the full Court from a decision of the Judge Ordinary must be asserted in writing and the instrument of appeal filed in the Registry within the time allowed by law for appealing from such decision; and on

the same day on which the appeal is filed, notice thereof, and a copy of the appeal, shall be delivered to each Respondent in the appeal, or to his or her proctor, solicitor, or attorney.—See Form of Instrument of Appeal, No. 11, post, p. 339.

78. The Appellant within ten days after filing his instrument of appeal, or within such further time as may be allowed by the Judge Ordinary, or by the Registrars in his absence, shall file in the Registry his case in support of the appeal in triplicate, and on the same day deliver a copy thereof to each Respondent in the appeal, or to his proctor, solicitor, or attorney, who, within ten days from the time of such filing and delivery or from such further time as may be allowed for the purpose by the Judge Ordinary, or the Registrars in his absence, shall be at liberty to file in the Registry a case against the appeal, also in triplicate, and the Respondent shall on the same day deliver a copy thereof to the Appellant, or to his proctor, solicitor, or attorney.

79. After the expiration of ten days from the time when the Respondent has filed his case, or, if he has filed none, from the time allowed him for the purpose, the appeal shall stand for hearing at the next sittings of the full Court, and will be called on in its turn, unless otherwise directed.

Decree absolute.

80. All applications to make absolute a decree nisi for dissolution of a marriage must be made to the Court by motion. In support of such applications it must be shown by affidavit filed with the case for motion that search has been made in the proper books at the Registry up to within two days of the affidavit being filed, and that at such time no person had obtained leave to intervene in the cause, and that no appearance had been entered nor any affidavits filed on behalf of any person wishing to show cause against the decree nisi being made absolute; and in case leave to intervene had been obtained, or appearance entered, or affidavits filed on behalf of any such person,

it must be shown by affidavit what proceedings, if any, had been taken thereon, but it shall not be necessary to file a copy of the decree nisi.—See Form of Affidavit, No. 12, post, p. 340.

Alimony.

81. The wife, being the Petitioner in a cause, may file her petition for alimony pending suit at any time after the citation has been duly served on the husband, or after order made by the Judge Ordinary to dispense with such service, provided the factum of marriage between the parties is established by affidavit previously filed.

82. The wife, being the Respondent in a cause, after having entered an appearance, may also file her petition for alimony pending suit.

83. See Form of Petition for Alimony, No. 13, post, p. 341.

84. The husband shall, within eight days after the filing and delivery of a petition for alimony, file his answer thereto upon oath.

85. The husband, being Respondent in the cause, must enter an appearance before he can file an answer to a petition for alimony.

86. The wife, if not satisfied with the husband's answer, may object to the same as insufficient, and apply to the Judge Ordinary on motion to order him to give a further and fuller answer, or to order his attendance on the hearing of the petition for the purpose of being examined thereon.

87. In case the answer of the husband alleges that the wife has property of her own, she may (within eight days) file a reply on oath to that allegation; but the husband is not at liberty to file a rejoinder to such reply without permission of the Judge Ordinary, or of one of the Registrars in his absence.

88. A copy of every petition for alimony, answer and reply, must be delivered to the opposite party, or to his or her proctor, solicitor, or attorney, on the day the same is filed.

89. After the husband has filed his answer to the petition for alimony (subject to any order as to costs), or, if no answer is filed, at the expiration of the time allowed for filing an answer, the wife may proceed to examine witnesses in support of her petition, and apply by motion for an allotment of alimony pending suit, notice of the motion, and of the intention to examine witnesses, being given to the husband, or to his proctor, solicitor, or attorney, four days previously to the motion being heard and the witnesses examined, unless the Judge Ordinary shall dispense with such notice.

90. No affidavits can be read or made use of as evidence in support of or in opposition to the averments contained in a petition for alimony, or in an answer to such a petition, or in a reply, except such as may be required by the Judge Ordinary or by one of the Registrars.

91. A wife who has obtained a final decree of judicial separation in her favour, and has previously thereto filed her petition for alimony pending suit, on such decree being affirmed on appeal to the full Court, or after the expiration of the time for appealing against the decree, if no appeal be then pending, may apply to the Judge Ordinary by motion for an allotment of permanent alimony; provided that she shall, eight days at least before making such application, give notice thereof to the husband, or to his proctor, solicitor, or attorney.

92. A wife may at any time after alimony has been allotted to her, whether alimony pending suit or permanent alimony, file her petition for an increase of the alimony allotted by reason of the increased faculties of the husband, or the husband may file a petition for a diminution of the alimony allotted by reason of reduced faculties; and the course of proceeding in such cases shall be the same as required by these rules and regulations in respect of the original petition for alimony, and the allotment thereof, so far as the same are applicable.

93. Permanent alimony shall, unless otherwise ordered, commence and be computed from the date of the final

decree of the Judge Ordinary, or of the full Court on appeal, as the case may be.

94. Alimony, pending suit, and also permanent alimony, shall be paid to the wife, or to some person or persons to be nominated in writing by her, and approved of by the Court, as trustee or trustees on her behalf.

Maintenance and Settlements.

95. Applications to the Court to exercise the authority given by Sections 32 and 45 of 20 & 21 Vict. c. 85., and by Section 5 of the 22 & 23 Vict. c. 61., are to be made in a separate petition, which must, unless by leave of the Judge, be filed as soon as by the said statutes such applications can be made, or within one month thereafter.

96. In cases of application for maintenance under Section 32 of the 20 & 21 Vict. c. 85., such petition may be filed as soon as a decree nisi has been pronounced, but not before.

97. A certified copy of such petition, under seal of the Court, shall be personally served on the husband or wife (as the case may be), and on the person or persons who may have any legal or beneficial interest in the property in respect of which the application is made, unless the Judge Ordinary on motion shall direct any other mode of service, or dispense with service of the same on them or either of them.

98. The husband or wife (as the case may be), and the other person or persons (if any) who are served with such petition, within fourteen days after service, may file his, her, or their answer on oath to the said petition, and shall on the same day deliver a copy thereof to the opposite party, or to his proctor, solicitor, or attorney.

99. Any person served with the petition, not being a party to the principal cause, must enter an appearance before he or she can file an answer thereto.

100. Within fourteen days from the filing the answer, the opposite party may file a reply thereto, and the same

period shall be allowed for filing any further pleading by way of rejoinder.

101. Such pleadings, when completed, shall in the first instance be referred to one of the Registrars, who shall investigate the averments therein contained, in the presence of the parties, their proctors, solicitors, or attorneys, and who for that purpose shall be at liberty to require the production of any documents referred to in such pleadings, or to call for any affidavits, and shall report in writing to the Court the result of his investigation, and any special circumstances to be taken into consideration with reference to the prayer of the petition.

102. The report of the Registrar shall be filed in the Registry by the husband or wife on whose behalf the petition has been filed, who shall give notice thereof to the other parties heard by the Registrar; and either of the parties, within fourteen days after such notice has been given, if the Judge Ordinary be then sitting to hear motions, otherwise on the first day appointed for motions after the expiration of fourteen days, may be heard by the Judge Ordinary on motion in objection to the Registrar's report, or may apply on motion for a decree or order to confirm the same, and to carry out the prayer of the petition.

103. The costs of a wife of and arising from the said petition or answer shall not be allowed on taxation of costs against the husband before the final decree in the principal cause, without direction of the Judge Ordinary.

Custody of and Access to Children.

104. Before the trial or hearing of a cause a husband or wife who are parties to it may apply for an order with respect to the custody, maintenance, or education of or for access to children, issue of their marriage, to the Judge Ordinary, by motion founded on affidavit.

Guardians to Minors.

105. A minor above the age of seven years may elect any one or more of his or her next of kin, or next friends,

as guardian, for the purpose of proceeding on his or her behalf as Petitioner, Respondent, or Intervener in a cause.—See Form of an Instrument of Election, No. 14, post, p. 341.

106. The necessary instrument of election must be filed in the Registry before the guardian elected can be permitted to extract a citation or to enter an appearance on behalf of the minor.

107. When a minor shall elect some person or persons other than his or her next of kin, as guardian for the purposes of a suit, or when an infant (under the age of seven years) becomes a party to a suit, application, founded on affidavit, is to be made to one of the Registrars, who will assign a guardian to the minor or infant for such suit.

108. It shall not be necessary for a minor who, as an alleged adulterer, is made a Co-respondent in a suit, to elect a guardian or to have a guardian assigned to him for the purpose of conducting his defence.

*Subpœnas.**

109. Every subpœna shall be written or printed on parchment, and may include the names of any number of witnesses. The party issuing the same, or his or her proctor, solicitor, or attorney, shall take it, together with a præcipe, to the Registry, and there get it signed and sealed, and there deposit the præcipe.

* And see Rule, 180, and Forms of Subpœna, Nos. 15, 17, post, pp. 343, 344 ; and Forms of Præcipe, Nos. 16, 18, post, pp. 343, 345.

Writs of Attachment and other Writs.

110. Applications for writs of attachment, and also for writs of fieri facias and of sequestration, must be made to the Judge Ordinary by motion in Court.

111. Such writs, when ordered to issue, are to be prepared by the party at whose instance the order has been obtained, and taken to the Registry, with an office copy o

the order, and, when approved and signed by one of the Registrars, shall be sealed with the seal of the Court, and it shall not be necessary for the Judge Ordinary or for other Judges of the Court to sign such writs.

112. Any person in custody under a writ of attachment may apply for his or her discharge to the Judge Ordinary if the Court be then sitting; if not, then to one of the Registrars, who for good cause shown shall have power to order such discharge.

Notices.

113. All notices required by these Rules and Regulations, or by the practice of the Court, shall be in writing, and signed by the party, or by his or her proctor, solicitor, or attorney.

Service of Notices, &c.

114. It shall be sufficient to leave all notices and copies of pleadings and other instruments which by these rules and regulations are required to be given or delivered to the opposite parties in the cause, or to their proctors, solicitors, or attorneys, and personal service of which is not expressly required at the address furnished as aforesaid by the Petitioner and Respondent respectively.

115. When it is necessary to give notice of any motion to be made to the Court, such notice shall be served on the opposite parties who have entered an appearance four clear days previously to the hearing of such motion, and a copy of the notice so served shall be filed in the Registry with the case for motion, but no proof of the service of the notice will be required, unless by direction of the Judge Ordinary.

116. If an order be obtained on motion without due notice to the opposite parties, such order will be rescinded on the application of the parties upon whom the notice should have been served; and the expense of and arising from the rescinding of such order shall fall on the party who obtained it, unless the Judge Ordinary shall otherwise direct.

117. When it is necessary to serve personally any order or decree of the Court, the original order or decree, or an office copy thereof, under seal of the Court, must be produced to the party served, and annexed to the affidavit of service marked as an exhibit by the Commissioner or other person before whom the affidavit is sworn.

Office Copies, Extracts, &c.

118. The Registrars of the Principal Registry of the Court of Probate are to have the custody of all pleadings and other documents now or hereafter to be brought in or filed, and of all entries of orders and decrees made in any matter or suit depending in the Court for Divorce and Matrimonial Causes ; and all Rules and Orders, and Fees payable in respect of searches for and inspection or copies of and extracts from and attendance with books and documents in the Registry of the Court of Probate, shall extend to such pleadings and other documents brought in or filed, and all entries of orders and decrees made in the Court for Divorce and Matrimonial Causes, save that the length of copies and extracts shall in all cases be computed at the rate of 72 words per folio.

119. Office copies or extracts furnished from the Registry of the Court of Probate will not be collated with the originals from which the same are copied, unless specially required. Every copy so required to be examined shall be certified under the hand of one of the Principal Registrars of the Court of Probate to be an Examined Copy.

120. The seal of the Court will not be affixed to any copy which is not certified to be an examined copy.

Time fixed by these Rules.

121. The Judge Ordinary shall in every case in which a time is fixed by these Rules and Regulations for the performance of any act, or for any proceeding in default, have power to extend the same to such time and with such qualifications and restrictions and on such terms as to him may seem fit.

122. To prevent the time limited for the performance

of any act, or for any proceeding in default, from expiring before application can be made to the Judge Ordinary for an extension thereof, any one of the Registrars may, upon reasonable cause being shown, extend the time, provided that such time shall in no case be extended beyond the day upon which the Judge Ordinary shall next sit in Chambers.

123. The time fixed by these Rules and Regulations for the performance of any act or for any proceeding in a cause, shall in all cases be exclusive of Sundays, Christmas Day, and Good Friday.

Protection Orders.

124. Applications on the part of a wife deserted by her husband for an order to protect her earnings and property, acquired since the commencement of such desertion, shall be made in writing to the Judge Ordinary in Chambers, and supported by affidavit.—See Form of Application, No. 19, post, p. 345.

125. Applications for the discharge of any order made to protect the earnings and property of a wife are to be made to the Judge Ordinary by motion, and supported by affidavit. Notice of such motion, and copies of any affidavit or other document to be read or used in support thereof, must be personally served on the wife eight clear days before the motion is heard.

Bond not required.

126. On a decree of judicial separation being pronounced, it shall not be necessary for either party to enter into a bond conditioned against marrying again.

Change of Proctor, Solicitor, or Attorney.

127. A party may obtain an order to change his or her proctor, solicitor, or attorney upon application by summons to the Judge Ordinary, or to the Registrars in his absence.

128. In case the former proctor, solicitor, or attorney neglects to file his bill of costs for taxation at the time required by the order served upon him, the party may,

with the sanction and by order of the Judge Ordinary or of the Registrars, proceed in the cause by the new proctor, solicitor, or attorney, without previous payment of such costs.

Order for the immediate Examination of a Witness.

129. Application for an order for the immediate examination of a witness who is within the jurisdiction of the Court is to be made to the Judge Ordinary, or to the Registrars in his absence, by summons, or if on behalf of a Petitioner proceeding in default of appearance of the parties cited in the cause without summons before one of the Registrars, who will direct the order to issue, or refer the application to the Judge Ordinary, as he may think fit.

130. Such witness shall be examined *vivâ voce*, unless otherwise directed, before a person to be agreed upon by the parties in the cause, or to be nominated by the Judge Ordinary or by the Registrars to whom the application for the order is made.

131. The parties entitled to cross-examine the witness to be examined under such an order shall have four clear days notice of the time and place appointed for the examination, unless the Judge Ordinary or the Registrars to whom the application is made for the order shall direct a shorter notice to be given.

Commissions and Requisitions for Examination of Witnesses.

132. Application for a commission or requisition to examine witnesses who are out of the jurisdiction of the Court is to be made by summons, or if on behalf of a Petitioner proceeding in default of appearance without summons, before one of the Registrars, who will order such commission or requisition to issue, or refer the application to the Judge Ordinary, as he may think fit.

133. A commission or requisition for examination of witnesses may be addressed to any person to be nominated and agreed upon by the parties in the cause, and approved of by the Registrar, or for want of agreement to be nominated by the Registrar to whom the application is made.

134. The commission or requisition is to be drawn up and prepared by the party applying for the same, and a copy thereof shall be delivered to the parties entitled to cross-examine the witnesses to be examined thereunder two clear days before such commission or requisition shall issue, under seal of the Court, and they or either of them may apply to one of the Registrars by summons to alter or amend the commission or requisition, or to insert any special provision therein, and the Registrar shall make an order on such application, or refer the matter to the Judge Ordinary.—See Form of a Commission and Requisition, No. 20, post, p. 346.

135. Any of the parties to the cause may apply to one of the Registrars by summons for leave to join in a commission or requisition, and to examine witnesses thereunder; and the Registrar to whom the application is made may direct the necessary alterations to be made in the commission or requisition for that purpose, and settle the same, or refer the application to the Judge Ordinary.

136. After the issuing of a summons to show cause why a party to the cause should not have leave to join in a commission or requisition, such commission or requisition shall not issue under seal without the direction of one of the Registrars.

137. In case a husband or wife shall apply for and obtain an order or a commission or requisition for the examination of witnesses, the wife shall be at liberty, without any special order for that purpose, to apply by summons to one of the Registrars to ascertain and report to the Court what is a sufficient sum of money to be paid or secured to the wife to cover her expenses in attending at the examination of such witnesses in pursuance of such order, or in virtue of such commission or requisition, and such sum of money shall be paid or secured before such order or such commission or requisition shall issue from the Registry, unless the Judge Ordinary or one of the Registrars in his absence shall otherwise direct.

Affidavits.

138. Every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent is to be inserted therein.

139. In every affidavit made by two or more persons, the names of the several persons making it are to be written in the jurat.

140. No affidavit will be admitted in any matter depending in the Court for Divorce and Matrimonial Causes in which any material part is written on an erasure, or in the jurat of which there is any interlineation or erasure, or in which there is any interlineation the extent of which at the time when the affidavit was sworn is not clearly shown by the initials of the Registrar, Commissioner, or other authority before whom it was sworn.

141. Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the Registrar, Commissioner, or other authority before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also made his or her mark or wrote his or her signature thereto in the presence of the Registrar, Commissioner, or other authority before whom the affidavit was made.

142. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his or her proctor, solicitor, or attorney, or before a partner or clerk of his or her proctor, solicitor, or attorney.

143. Proctors, solicitors, and attorneys, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the Rules and Regulations in respect of taking affidavits which are applicable to those in whose stead they are acting.

144. No affidavit can be read or used unless the proper stamps to denote the fees payable on filing the same are delivered with such affidavit.

145. Where a special time is fixed for filing affidavits, no affidavit filed after that time shall be used unless by leave of the Judge Ordinary.

146. The above Rules and Regulations in respect to affidavits shall, so far as the same are applicable, be observed in respect to affirmations and declarations to be read or used in the Court for Divorce and Matrimonial Causes.

Cases for Motion.

147. Cases for motion are to set forth the style and object of, and the names and descriptions of the parties to, the cause or proceeding before the Court; the proceedings already had in the cause, and the dates of the same; the prayer of the party on whose behalf the motion is made, and briefly, the circumstances on which it is founded.

148. If the cases tendered are deficient in any of the above particulars, the same shall not be received in the Registry without permission of one of the Registrars.

149. On depositing the case in the Registry, and giving notice of the motion, the affidavits in support of the motion, and all original documents referred to in such affidavits, or to be referred to by counsel on the hearing of the motion, must be also left in the Registry; or in case such affidavits or documents have been already filed or deposited in the Registry, the same must be searched for, looked up, and deposited with the proper clerk, in order to their being sent with the case to the Judge Ordinary.

150. Copies of any affidavits or documents to be read or used in support of a motion are to be delivered to the opposite parties to the suit who are entitled to be heard in opposition thereto.

Taxing Bills of Costs.

151. All bills of costs are referred to the Registrars of the Principal Registry of the Court of Probate for taxation, and may be taxed by them, without any special order for that purpose. Such bills are to be filed in the Registry.

152. Notice of the time appointed for taxation will be forwarded to the party filing the bill, at the address furnished by such party.

153. The party who has obtained an appointment to tax a bill of costs shall give the other party or parties to be heard on the taxation thereof at least one clear day's notice of such appointment, and shall at or before the same time deliver to him or them a copy of the bill to be taxed.

154. When an appointment has been made by a Registrar of the Court of Probate for taxing any bill of costs, and any parties to be heard on the taxation do not attend at the time appointed, the Registrar may nevertheless proceed to tax the bill after the expiration of a quarter of an hour, upon being satisfied by affidavit that the parties not in attendance had due notice of the time appointed.

155. The bill of costs of any proctor, solicitor, or attorney will be taxed on his application as against his client, after sufficient notice given to the person or persons liable for the payment thereof, or on the application of such person or persons, after sufficient notice given to the practitioner.

156. The fees payable on the taxation of any bill of costs shall be paid by the party on whose application the bill is taxed, and shall be allowed as part of such bill; but if more than one sixth of the amount of any bill of costs taxed as between practitioner and client is disallowed on the taxation thereof, no costs incurred in such taxation shall be allowed as part of such bill.

157. If an order for payment of costs is required, the same may be obtained by summons, on the amount of such costs being certified by the Registrar.

Wife's Costs.

158. After directions given as to the mode of hearing or trial of a cause, or in an earlier stage of a cause by order of the Judge Ordinary, or of the Registrars in his absence, to be obtained on summons, a wife who has entered an appearance may file her bill of costs for taxation

as against her husband, and the Registrar to whom such bill of costs is referred for taxation shall at the same time, if directions as to the mode of hearing or trial have been given, otherwise when the same are given, ascertain and report to the Court what is a sufficient sum of money to be paid into the Registry, or what is a sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing or trial of the cause.— See Form of Bond for securing a Wife's Costs of Hearing or Trial of a Cause, No. 21, post, p. 347.

159. When on the hearing or trial of a cause the decision of the Judge Ordinary or the verdict of the Jury is against the wife, no costs of the wife of and incidental to such hearing or trial shall be allowed as against the husband, except such as shall be applied for, and ordered to be allowed by the Judge Ordinary, at the time of such hearing or trial.

Summonses.

160. A summons may be taken out by any person in any matter or suit depending in the Court for Divorce and Matrimonial Causes, provided there is no rule or practice requiring a different mode of proceeding.

161. The name of the cause or matter, and of the agent taking out the summons, is to be entered in the Summons Book, and a true copy of the summons is to be served on the party summoned one clear day at least before the summons is returnable, and before 7 o'clock p.m. On Saturdays the copy of the summons is to be served before 2 o'clock p.m.

162. On the day and at the hour named in the summons the party taking out the same is to present himself with the original summons at the Judge's Chambers, or elsewhere appointed for hearing the same.

163. Both parties will be heard by the Judge Ordinary, who will make such order as he may think fit, and a minute of such order will be made by one of the Registrars in the Summons Book.

164. If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the party taking out the summons shall be at liberty to go before the Judge Ordinary, who will thereupon make such order as he may think fit.

165. An attendance on behalf of the party summoned for the space of half an hour, if the party taking out the summons do not during such time appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the Judge Ordinary on that occasion.

166. If a formal order is desired, the same may be had on the application of either party, and for that purpose the original summons, or the copy served on the party summoned, must be filed in the Registry. An order will thereupon be drawn up, and delivered to the person filing such summons or copy.

167. If a summons is brought to the Registry, with consent to an order endorsed thereon, signed by the party summoned, or by his proctor, solicitor, or attorney, an order will be drawn up without the necessity of going before the Judge Ordinary: provided that the order sought is in the opinion of the Registrar one which, under the circumstances, would be made by the Judge Ordinary.

168. The same Rules and Regulations shall, so far as applicable, be observed in respect to summonses which may be heard and disposed of by the Registrars.

Payment of Money out of Court.

169. Persons applying for payment of money out of Court are to bring into the Registry a notice in writing setting forth the day on which the money applied for was paid into the Registry, the minute entered in the Court books on receiving the same, the date and particulars of the order for payment to the applicant. In case the money applied for be in payment of costs, the notice must also set forth the date of filing the bill for taxation, and of the Registrar's certificate.

170. The above notice must be deposited in the Registry two clear days at least before the money is paid out, and is, in that interval, to be examined by one of the Clerks of the Registry with the original entries in the Court books, and the bills of costs referred to in it, and certified by such Clerk to be correct.

171. When the Court is not sitting, payment of money out of Court will be made only on such day or days of the week as may be fixed by the Registrars, notice whereof will be given in the Registry.

Registries and Officers.

172. The Registry of the Court for Divorce and Matrimonial Causes, and the clerks employed therein, shall be subject to and under the control of the Registrars of the Principal Registry of the Court of Probate.

173. The Record Keepers, the Sealer, and other officers of the Principal Registry of the Court of Probate, shall discharge the same or similar duties in the Court for Divorce and Matrimonial Causes, and in the Registry thereof, as they discharge in the Court of Probate and the Principal Registry thereof.

Proceedings under the "Legitimacy Declaration Act, 1858."

174. The above Rules and Regulations, so far as the same may be applicable, shall extend to applications and proceedings under "the Legitimacy Declaration Act, 1858."

ADDITIONAL RULES AND REGULATIONS.*

Restitution of Conjugal Rights.

175. The Affidavit filed with the Petition, as required by Rule 2, shall further state sufficient facts to satisfy one of the Registrars that a written demand for cohabitation and restitution of conjugal rights has been made by the Petitioner upon the party to be cited, and that after a reasonable opportunity for compliance therewith such

* To take effect on and after the first day of March, 1869.

cohabitation and restitution of conjugal rights has been withheld.

176. At any time after the commencement of proceedings for restitution of conjugal rights the Respondent may apply by summons to the Judge, or to the Registrars in his absence, for an order to stay the proceedings in the cause by reason that he or she is willing to resume or to return to cohabitation with the Petitioner.

As to Costs.

177. In all cases in which the Court at the hearing of a cause condemns any party to the suit in costs, the proctor, solicitor, or attorney of the party to whom such costs are to be paid may forthwith file his bill of costs in the Registry, and obtain an appointment for the taxation, provided that such taxation shall not take place before the time allowed for moving for a new trial or re-hearing shall have expired; or, in case a rule *nisi* should have been granted, until the rule is disposed of, unless the Judge Ordinary shall, for cause shown, direct a more speedy taxation.

178. Upon the Registrar's certificate of costs being signed, he shall at once issue an order of the Court for payment of the amount within seven days.

179. This order shall be served on the proctor, solicitor, or attorney of the party liable, [or if it is desired to enforce the order by attachment on the party himself], and if the costs be not paid within the seven days a writ of *Fieri facias* or writ of sequestration shall be issued as of course in the Registry, upon an affidavit of service of the order, and nonpayment.

As to Subpœnas.

180. The issuing of fresh subpœnas in each term shall be abolished, and it shall not be necessary to serve more than one subpœna upon any witness. See Forms 15, 17, post, pp. 343, 344.

DEBTORS ACT, 1869.

Rules for regulating the Practice under and carrying into effect the First Part of the said Act.

In pursuance of "the Debtors Act, 1869," it is ordered that, on and after the date mentioned at the foot of these Rules, the following Rules shall be in force for regulating the practice under and carrying into effect the first part of the said "Debtors Act, 1869."

1. All applications to commit to prison under Section 5. shall in the first instance be made by Summons before the Judge Ordinary, which shall specify the date and other particulars of the order for nonpayment of which the application is made, together with the amount due, and be endorsed with the name and place of abode or office of business of the Proctor or Attorney actually suing out the Summons, and in case such Attorney shall not be an Attorney of this Court then also with the name and place of abode or office of business of the Attorney in whose name such Summons shall be taken out, and when the Attorney actually suing such Summons shall sue out the same as agent for an Attorney in the country, the name and place of abode of such Attorney in the country shall also be endorsed upon the said Summons, and in case no Attorney shall be employed to issue the Summons then it shall be endorsed with a Memorandum expressing that the same has been sued out by the Petitioner or Respondent or Co-respondent in person, as the case may be, mentioning the City, Town, or Parish, and also the name of the hamlet, street, and number of the house of such Petitioner's, Respondent's, or Co-respondent's residence, if any such there be.

2. The service of the Summons, whenever it may be practicable, shall be personal; but if it appear to the Judge Ordinary that reasonable efforts have been made to effect personal service, and either that the Summons has come to the knowledge of the Debtor, or that he

wilfully evades service, an order may be made as if personal service had been effected upon such terms as to the Judge Ordinary may seem fit.

3. Proof of the means of the Debtor shall, whenever practicable, be given by Affidavit, but if it appear to the Judge Ordinary either before or at the hearing that a *vivâ voce* examination, either of the Debtor or of any other person, or the production of any document, is necessary or expedient, an order may be made commanding the attendance of any such person before the Judge Ordinary at a time and place to be therein mentioned for the purpose of being examined on oath touching the matter in question (or and) for the production of any such document subject to such terms and conditions as to the Judge Ordinary may seem fit. The disobedience to any such order shall be deemed a Contempt of Court, and punishable accordingly.

4. The order of committal (which may be in the form A. in the Schedule or to the like effect) shall before delivery to the Sheriff be endorsed with the particulars required by Rule 1. of these Rules. Concurrent orders may be issued for execution in different counties. The Sheriff shall be entitled to the same fees in respect thereof as are now payable upon a *Ca. sa.*

5. Upon payment of the sum or sums mentioned in the order (including the Sheriff's fees in like manner as upon a *Ca. sa.*) the Debtor shall be entitled to a Certificate in the form B. in the Schedule, or to the like effect, signed by the Proctor or Attorney in the Cause, of the Petitioner, Respondent, or Co-respondent, as the case may be, or signed by the Petitioner, Respondent, or Co-respondent, as the case may be, and attested by an Attorney or Justice of the Peace.

6. The Sheriff or other officer named in an order of committal shall within two days after the arrest endorse on the order the true date of such arrest.

Dated this 15th day of February, 1870.

SCHEDULE.

A.

Upon hearing, &c. [*Christian and Surname of the Debtor and party claiming*] I do order, That the said *A.B.* be for default of payment of the debt herein-after mentioned committed to prison for the term of _____ weeks from the date of his arrest, including the day of such date, or until he shall pay £ _____, being the amount of [*here state the particulars of the debt or liability*], and which the said *A.B.* was on the _____ day of _____ ordered by the Court for Divorce and Matrimonial Causes to pay to the said _____ [or, into the Registry of the said Court], together with £ _____ for costs of this order, and Sheriff's fees for the execution thereof, and I order that the Sheriff of _____ do take the said *A.B.* for the purpose aforesaid, if he shall be found within his bailiwick.

Dated, &c. _____

B.

I certify, That *A.B.*, now in the Goal of _____ upon an order of the Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes, at the suit of *C.D.* for nonpayment of a debt of _____ has satisfied the said debt, together with the costs mentioned in the said order.

Dated, &c. _____

E.F. of, &c.,
Proctor or Attorney for the said *C.D.*,
or *C.D.* of, &c.

Witness to the Signature of *C.D.*,
G.H., his Attorney,
or *I.K.*, Justice of the Peace for _____

(Signed) PENZANCE.

Approved.
(Signed) HATHERLEY, C.

February 15th, 1870.

Which are to be followed as nearly as the circumstances of each case will allow.

**To the Judge Ordinary of Her Majesty's Court for
Divorce and Matrimonial Causes.**

1. That your Petitioner was on the day of
18 , lawfully married to C.B., then C.D. [Spinster
or Widow], at the *Parish Church of, &c.*

2. That after his said marriage your Petitioner lived and cohabited with his said wife at _____ and at _____, and that your Petitioner and his said wife have had issue of their said marriage three children : to wit :

8. That on the _____ day of _____ 18____, and
on other days between that day and _____,
the said C.B., at _____ in the county of _____,
committed adultery with R.S. :

Your Petitioner therefore humbly prays,—

That your Lordship will be pleased to decree :

[*For instance*], a dissolution of the said marriage and that the said *R.S.* do pay the sum of £ as

damages, by reason of his having committed adultery with the said *C.B.*

: And that your Petitioner may have such further and other relief in the premises as to your Lordship may seem meet.

[*Petitioner's signature.*]

In a petition by the wife, the formal paragraphs alleging the marriage, cohabitation, birth of children, &c. are in the same form. Acts of adultery or cruelty must be stated clearly and concisely in separate paragraphs. See ante, pp. 63, 64, 85. Desertion must be alleged thus : ' that on the day of the said *C.B.* deserted your petitioner, and has ever since lived separate and apart from her.' See ante, p. 112. The prayer may be : to decree a dissolution of the said marriage ; or : to decree a sentence of judicial separation ; and conclude as above.

The verifying affidavit is to be headed thus :—

In Her Majesty's Court for Divorce and Matrimonial Causes.

In the matter of the petition of *A.B.*

I, *A.B.* of make oath and say as follows :—
[Then set out the allegations of the petition, paragraph by paragraph in the first person, that is, those of which the petitioner has personal cognizance, viz., the marriage, &c. the cruelty or desertion ; and with respect to the adultery : That I am informed and verily believe, &c.]

That no collusion or connivance exists between me and my said [wife or husband].

Sworn by the said *A.B.* at, &c.

See Rule 142, ante, p. 322.

No. 2.—*Citation.*

In Her Majesty's Court for Divorce and Matrimonial Causes.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

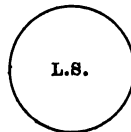
To *C.B.*, of in the County of

WHEREAS *A.B.*, of &c., claiming to have been lawfully married to has filed petition against in Our said Court, praying for

wherein alleges that you have been guilty of adultery [or have been guilty of cruelty towards the said or as the case may be] :

NOW THIS IS TO COMMAND YOU, that within eight days after service hereof on you, inclusive of the day of such service, you do appear in Our said Court then and there to make answer to the said petition, a copy whereof, sealed with the seal of Our said Court, is herewith served upon you. AND TAKE NOTICE, that in default of your so doing, Our said Court will proceed to hear the said charge [or charges] proved in due course of law, and to pronounce sentence therein, your absence notwithstanding. And take further notice, that for the purpose aforesaid you are to attend in person, or by your proctor, solicitor or attorney, at the Registry of Our said Court in Doctors Commons, London, and there to enter an appearance in a book provided for that purpose, without which you will not be allowed to address the Court, either in person or by counsel, at any stage of the proceedings in the cause.

Dated at London the day of , 186 , and in the year of Our Reign.



(Signed) X.Y, Registrar.

No. 3.—*Præcipe for Citation.*

In Her Majesty's Court for Divorce and Matrimonial Causes.

Citation for A.B., of against C.B., of ,
to appear in a suit for by reason of

(Signed) A.B. in person,

or

C.D., proctor, solicitor, or
attorney for the said A.B.

[Here insert the address required within three miles
of the General Post Office.]

This citation was duly served by the under-signed *G.H.*
on the within-named *C.B.*, of at on
the day of 18 .
(Signed) *G.H.*

Sworn at &c. on the
day of 18 . Before me }

A.B., Petitioner,
against
C.B., Respondent,
and
E.F., Co-Respondent. { The Respondent, *C.B.*, appears in person [or *C.D.*, the proctor, solicitor, or attorney for *C.B.*, the Respondent (or *E.F.*, the Co-Respondent), appears for the said Respondent or Co-Respondent].

[Here insert the address required within three miles of
General Post Office.]

Entered this day of 18 .

No. 7.—Answer.

In Her Majesty's Court for Divorce and Matrimonial
Causes.

The day of 18 .

A.B. v. C.B.

The Respondent, *C.B.*, by *C.D.*, her proctor, solicitor,
or attorney [*or in person*], in answer to the petition filed
in this cause, saith,—

1. That she denies that she committed adultery with
R.S., as set forth in the said petition :
2. Respondent further saith, that on the day of
18 , and on other days between that
day and , the said *A.B.*, at in the
county of , committed adultery with *K.L.*

[*In like manner Respondent is to state connivance, con-
donation, or other matters relied on as a ground for dis-
missing the petition.*]

Connivance or condonation may be pleaded consistently
with a denial, thus :

That the Petitioner condoned the said adultery with
R.S. if any.

Wherefore this Respondent humbly prays,—

That your Lordship will be pleased to reject the
prayer of the said petition, and decree, &c.

The verifying affidavit, except that it is to be headed in
the cause, *A.B. v. C.B.*, must be similar in form to that
in support of a petition.

The petitioner may reply as follows :

The Petitioner *A.B.* by his attorney, says:—
That he denies that he committed adultery with *K.L.* as
in the second paragraph of the answer alleged, and
joins issue thereon.

That even if he had condoned the said adultery of the respondent with the said *R.S.*, the same was revived by the subsequent adultery of the respondent with the said *R.S.* [or with *G.H.* if adultery has been alleged with more than one person] as set forth in the petition.

Wherefore the petitioner prays as before.

No. 8.—*Questions of Fact for the Jury.*

In Her Majesty's Court for Divorce and Matrimonial Causes.

A.B. against *C.B.* and *E.F.*

Questions for the Jury.

1. Whether *C.B.*, the Respondent, committed adultery with *E.F.*, the Co-Respondent.
2. Whether *A.B.*, the Petitioner, has condoned the adultery committed by *C.B.*, the Respondent (if any).
3. Whether *A.B.*, the Petitioner, has been guilty of cruelty towards *C.B.*, the Respondent.
[Here set forth in the same form all the questions at issue between the parties.]
4. What amount of damages should be paid by *E.F.*, the Co-Respondent, in respect of the adultery (if any) by him committed.

No. 9.—*Act on Petition.*

In Her Majesty's Court for Divorce and Matrimonial Causes.

A.B. against *C.B.* and *E.F.*

On the day of 18 .

A.B., the Petitioner [or *C.D.*, the proctor, solicitor, or attorney of *A.B.*, the Petitioner] alleged that

[Here state briefly the facts and circumstances upon which the petition is founded.]

Wherefore the said *A.B.*, or *C.D.*, referring to the

affidavits and proofs to be by him exhibited in verification of what he so alleged, prayed that

[Here set forth the prayer of the Petitioner.]

(Signed) A.B.

or

C.D.

Answer.

In Her Majesty's Court for Divorce and Matrimonial Causes.

A.B. against C.B. and E.F.

On the day of 18 .

C.B., the Respondent [*or G.H.*, the proctor, solicitor, or attorney of C.B., the Respondent] in answer to the allegations in the act on petition, bearing date the day of 18 , of A.B., admitted [*or denied*] that

[Here set forth any allegations admitted or denied.]

And he alleged that

[Here state any facts or circumstances in explanation or in answer.]

Wherefore the said C.B. or G.H., referring to the affidavits and proofs to be by her exhibited in verification of what she so alleged, prayed

[Here state the prayer of Respondent.]

(Signed) C.B.

or

G.H.

Conclusion.

A.B. against C.B. and E.F.

On the day of 18 .

A.B., the Petitioner [*or C.D.*, the proctor, solicitor, or attorney for A.B., the Petitioner] in reply to the allegations of C.B. [*or G.H.*] in her answer, bearing date

denied the same in great part to be true or relevant. Wherefore he alleged and prayed as before.

(Signed) A.B.

or

C.D.

No. 10.—*Petition for Reversal of Decree.*

To the Judge Ordinary of Her Majesty's Court for
Divorce and Matrimonial Causes.

The day of 18 .

The petition of *A.B.*, of , sheweth,—

1. That your Petitioner was on the day of
18 , lawfully married to *C.B.*, then *C.D.*, Spinster
[or Widow] at the Parish of *&c.*

[*Here state where the marriage took place.*]

2. That on the day of your
Lordship, by your final decree, pronounced in a cause
then depending in this Court, entitled *C.B.* against
A.B., decreed as follows; to wit:

[*Here set out the decree.*]

3. That the aforesaid decree was obtained in the absence
of your Petitioner, who was then residing at

[*State facts tending to show that the Petitioner
did not know of the proceedings; and further,
that had he known of them he might have offered
a sufficient defence.*]

or,

That there was reasonable ground for your Petitioner
leaving his said wife

[*Here state any legal grounds justifying the
Petitioner's separation from his wife.*]

Your Petitioner therefore humbly prays,—

That your Lordship will be pleased to reverse the
said decree.

No. 11.—*Appeal.*

I *A.B.* the Petitioner [*or C.D.* the proctor, solicitor, or
attorney of *A.B.* the Petitioner], in a suit lately depend-
ing in Her Majesty's Court for Divorce and Matrimonial
Causes, entitled *A.B.* against *C.D.* and *E.F.*, do hereby,
in due time and place, complain of and appeal against a
certain order or decree made in the said cause by the
Right Honourable the Judge Ordinary of the said Court
on the day of 18 . Whereby,

amongst other things, the said Judge Ordinary did order and decree [*here set forth the whole of the decree, or such part of it as may be appealed against*].

(Signed) A.B.

or

C.D.

This instrument of appeal was lodged in the Registry of Her Majesty's Court for Divorce and Matrimonial Causes this day of 18 .

To be signed by a Clerk in the Registry.

No. 12.—*Affidavit in support of Motion for Decree absolute.*

In Her Majesty's Court for Divorce and Matrimonial Causes.

A.B. against C.B. and E.F.

I C.D. of &c., solicitor for A.B. the Petitioner in this cause, make oath and say, that on the day of 18 , I carefully searched the books kept in the Registry of the Court for the purpose of entering appearances, from and including the day of 18 , the day of the date of the decree nisi made in this cause, to the day of 18 , and that during such period no appearance has been entered in the said books by Her Majesty's Procurator General, or by or on behalf of any other person or persons whomsoever. And I further make oath and say, that I have also carefully searched the books kept in the said Registry for entering the minutes of proceedings had in this cause from and including the said day of 18 , to the day of 18 , and that no leave has been obtained by Her Majesty's Procurator General, or by any other person or persons whomsoever, to intervene in this cause, and that no affidavit or affidavits, instruments, or other documents whatsoever, have been filed in this cause by Her Majesty's Procurator General or any other

persons whomsoever during such period, or at any other period during the dependence of this cause, in opposition to the said decree nisi being made absolute.

Sworn at &c., on the day of }
18 Before me }

No. 13.—*Petition for Alimony.*

To the Judge Ordinary of Her Majesty's Court for
Divorce and Matrimonial Causes.

A.B. against *C.B.* and *E.F.*

The day of 18 .

The petition of *C.B.*, the lawful wife of *A.B.*, sheweth,—

1. That the said *A.B.* does now carry on and has for many years past carried on the business of a
at , and from such business he derives the net annual income of £ :
2. That the said *A.B.* is now or lately was possessed of or entitled to proprietary shares of the
Railway Company, amounting in
value to £ , and yielding a clear annual
dividend of £ :
3. That the said *A.B.* is possessed of certain stock-in-trade in his said business of a
of the value of £ .

[In same manner state particulars of any other property which the husband may possess.]

Your Petitioner therefore humbly prays,—

That your Lordship will be pleased to decree her such sum or sums of money by way of alimony pendente lite [*or permanent alimony*] as to your Lordship shall seem meet.

No. 14.—*Election of a Guardian.*

By a Petitioner.

Whereas a suit is about to be instituted in Her Majesty's Court for Divorce and Matrimonial Causes on

behalf of *A.B.* against *C.B.*, the wife of the said *A.B.* and *E.F.* And whereas the said *A.B.* is now a minor of the age of years and upwards, but under the age of 21 years, and therefore by law incapable of acting in his own name.

Now I the said *A.B.* do hereby make choice and elect *G.H.*, my natural and lawful father and next of kin, to be my curator or guardian for the purpose of instituting the said suit, and for the purpose of carrying on and prosecuting the same until a final decree shall be given and pronounced therein, or until I shall attain the age of 21 years, and I hereby appoint *C.D.*, of &c., my proctor [solicitor or attorney] to file or cause to be filed this my election for me in the Registry of the said Court.

In witness whereof I have here hereunto set my hand and seal this day in the year 18 .

(Signed) *A.B.* (L.S.)

Signed, sealed, and delivered by the within
named *A.B.* in the presence of

One attesting witness.

By a Respondent.

Whereas a citation bearing date the
day of 18 has issued under seal of
Her Majesty's Court for Divorce and Matrimonial Causes,
at the instance of *A.B.*, claiming to have been lawfully
married to *C.B.*, citing the said *C.B.* to appear in the
said Court, and then and there to make answer to a
certain petition of the said *A.B.* filed in the said Court.
And whereas the said *C.B.* is now a minor of the age of
 years and upwards, but under the age of 21 years,
and therefore by law incapable of acting in her own
name.

Now I the said *C.B.* do hereby make choice of and elect
G.H., my natural and lawful father and next of kin, to be
my curator or guardian for the purpose of entering an
appearance for me and on my behalf in the said Court,
and for the purpose of making answer for me to the said
petition, and of defending me in the said cause, and to
abide for me in judgment until a final decree shall be

given and pronounced therein, or until I shall attain the age of 21 years, and I hereby appoint, &c.

No. 15.—*Subpœna ad testificandum*.*

VICTORIA, by the Grace of God and of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to [names of all witnesses included in the subpœna to be inserted], Greeting. We command you and every of you to be and appear in your proper persons before [insert the name of the Judge], Judge Ordinary of Our Court for Divorce and Matrimonial Causes, at Westminster, in Our County of Middlesex, on the day of 18 , by eleven of the clock in the forenoon of the same day, and so from day to day, whenever Our said Court is sitting, until the cause or proceeding is heard, to testify the truth, according to your knowledge, in a certain cause now in Our said Court before Our said Judge Ordinary depending between A.B., Petitioner, and C.B., Respondent, and E.F., Co-Respondent, on the part of the Petitioner [or Respondent, or Co-Respondent or, as the case may be], and on the aforesaid day between the parties aforesaid to be heard. And this you or any of you shall by no means omit, under the penalty of each of you of £100. Witness [insert the name of the Judge], at the Court for Divorce and Matrimonial Causes, the day of 18 in the year of Our reign.

(Signed) X.Y., Registrar.

N.B.—Notice will be given to you of the day on which your attendance will be required.

No. 16.—*Præcipe for Subpœna ad testificandum*.

In Her Majesty's Court for Divorce and Matrimonial Causes.

Subpœna for [insert witnesses' names], to testify between A.B., Petitioner, C.B., Respondent, and E.F.,

* This Form was substituted for the former one by the additional rule, 180, of 1869, ante, p. 328.

Co-Respondent, on the part of the Petitioner [*or Respondent or Co-Respondent*].

(Signed) $\left\{ \begin{array}{c} \overline{A.B.} \\ \overline{C.D.} \\ \overline{E.F.} \end{array} \right\}$ or $\left\{ \begin{array}{c} P.A., \text{ Petitioner's } [or \text{ Respondent's or Co-Respondent's}] \text{ proctor, solicitor, or attorney.} \end{array} \right\}$

No. 17.—*Subpœna duces tecum*.*

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to [*names of all parties included in the subpoena to be inserted*], Greeting. We command you and every of you to be and appear in your proper persons before [*insert the name of the Judge*], Judge Ordinary of Our Court for Divorce and Matrimonial Causes at Westminster in Our county of Middlesex, on the day of 18 , by eleven of the clock in the forenoon of the same day, and so from day to day whenever Our said Court is sitting, until the cause or proceeding is heard, and also that you bring with you, and produce at the time and place aforesaid [*here describe shortly the deeds, letters, papers, &c. required to be produced*], then and there to testify and show all and singular those things which you or either of you know, or the said deed or instrument doth import, of and concerning a certain cause or proceeding now in Our said Court before Our said Judge Ordinary, depending between A.B., Petitioner, and C.B., Respondent, and E.F., Co-Respondent, on the part of the Petitioner [*or the Respondent or Co-Respondent, as the case may be*], and on the aforesaid day between the parties aforesaid to be heard. And this you or any of you shall by no means omit, under the penalty of each of you of £100. Witness [*insert the name of the Judge*], at Our Court for Divorce

* This Form was substituted for the former one by the additional rule, 180, of 1869.

and Matrimonial Causes, the day of
 18 in the year of Our reign.
 (Signed) X.Y., Registrar.

N.B.—Notice will be given to you of the day on which
 your attendance will be required.

No. 18.—*Præcipe for Subpœna duces tecum.*

In Her Majesty's Court for Divorce and Matrimonial
 Causes.

Subpœna for to testify and produce, &c. between
 A.B., Petitioner, C.B., Respondent, and E.F., Co-
 Respondent, on the part of the Petitioner [or Respondent
 or Co-Respondent].

(Signed) $\left\{ \begin{array}{l} \underline{A.B.} \\ \underline{C.B.} \\ \underline{E.F.} \end{array} \right\}$ or $\left\{ \begin{array}{l} P.A., \text{ Petitioner's [or Re-} \\ \text{spondent's or Co-Respon-} \\ \text{dent's]} \text{ proctor, solicitor,} \\ \text{or attorney.} \end{array} \right\}$

No. 19.—*Application for a Protection Order.*

To the Judge Ordinary of the Court for Divorce and
 Matrimonial Causes.

The application of C.B., of , the lawful
 wife of A.B., sheweth,—

That on the day of she was lawfully
 married to A.B. at :

That she lived and cohabited with the said A.B. for
 years at , and also at ,
 and hath had children, issue of her said
 marriage, of whom are now living with the
 applicant, and wholly dependent upon her earnings :

That on or about the said A.B., without
 any reasonable cause, deserted the applicant, and
 hath ever since remained separate and apart from
 her :

That since the desertion of her said husband the appli-
 cant hath maintained herself by her own industry,
 and hath thereby and otherwise acquired certain

property [or hath become possessed of certain property], consisting of [*here state generally the nature of the property*].

Wherefore the said *C.B.* prays an Order for the protection of her earnings and property acquired since the said day of , from the said *A.B.*, and from all creditors and persons claiming under him.

(Signed) *C.B.*

No. 20.—*Commission or Requisition for Examination of Witnesses.*

In Her Majesty's Court for Divorce and Matrimonial Causes.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to [*here set forth the name and proper description of the Commissioner*], Greeting. Whereas a certain cause is now depending in Our Court for Divorce and Matrimonial Causes between *A.B.*, Petitioner, and *C.B.*, Respondent, and *E.F.*, Co-Respondent, wherein the said *A.B.* has filed his petition praying for a dissolution of his marriage with the said *C.B.* [*or otherwise as in the prayer of the petition*]. And whereas by an order made in the said cause on the day of 186 on the application of the said *A.B.* it was ordered that a Commission [*or Requisition*] should issue under Seal of Our said Court for the examination of [*here insert name and address of one of the persons to be examined*] and others as witnesses to be produced on the part of the said *A.B.*, the Petitioner, in support of his said petition (saving all just exceptions). Now know ye that We do by virtue of this Commission [*or Requisition*] to you directed, authorize [*or request*] you within thirty days after the receipt of this Commission [*or Requisition*] at a certain time and place to be by you appointed for that purpose with power of adjournment to such other time and place as to you shall seem convenient to cause the said witnesses to come

before you and to administer to the said witnesses respectively an oath truly to answer such questions as shall be put to them by you touching the matters set forth in the said petition (a true and authentic copy whereof sealed with the seal of Our said Court is hereunto annexed) and such oath being administered We do hereby authorize [*or request*] and empower you to take the examination of the said witnesses, touching the matters set forth in the said petition, and to reduce the said examination or cause the same to be reduced into writing. And that for the purpose aforesaid you do assume to yourself some notary public or other lawful scribe as and for your actuary in that behalf if to you it should seem meet and convenient so to do. And the said examination being so taken and reduced into writing as aforesaid and subscribed by you We do require [*or request*] you forthwith to transmit the said examination, closely sealed up, to the Registry of Our said Court in Doctors Commons in the City of London together with these presents. And We do hereby give you full power and authority to do all such acts, matters, and things as may be necessary, lawful, and expedient for the due execution of this Our Commission [*or Requisition*].

Dated at London the day of in
the year of Our Lord One thousand eight hundred and
 , and in the year of Our
reign.

(Signed) X.Y., Registrar.

No. 21.—Bond for securing Wife's Costs.

Know all men by these presents that We, *A.B.* of *§c.*, *G.H.* of *§c.*, and *K.L.* of *§c.*, are held and firmly bound unto *X.Y.*, one of the Registrars of the Principal Registry of her Majesty's Court of Probate, in the penal sum of _____ pounds of good and lawful money of Great Britain, to be paid to the said *X.Y.*, and for which payment to be well and truly made we bind ourselves and each of us for the whole, our heirs, executors, or admi-

trators firmly by these presents. Sealed with our seals.

Dated the day of in the year of our
Lord 18 .

Whereas a certain cause is now depending in Her Majesty's Court for Divorce and Matrimonial Causes between *A.B.*, Petitioner of the one part, and *C.B.*, Respondent, and *E.F.*, Co-Respondent, of the other part. And whereas *X.Y.*, one of the Registrars of Her Majesty's Court of Probate, has by a Report under his hand, made in the said cause on the day of 18 , reported to the Court that pounds was a sufficient sum to be paid into the Registry of the Court of Probate to cover the Costs of the said Respondent [*or Petitioner*] of and incidental to the hearing of the said Cause [*or otherwise as in the Registrar's Report*], or that a bond under the hand and seal of the said *A.B.*, and of two sufficient sureties in the penal sum of pounds, conditioned for the payment of such costs of the said *C.B.* as shall be certified to be due and payable by the said *A.B.*, not exceeding the said sum of pounds [*or otherwise as in Report*], with hours notice of such sureties to the proctor [*solicitor or attorney*] of the said *C.B.* was a sufficient security to be given for the costs aforesaid. Now the condition of this obligation is such that if the above-bounden *A.B.*, his heirs, executors, or administrators shall well and truly pay or cause to be paid to the above-named *X.Y.*, his heirs, executors, administrators, or assigns the full sum of of good and lawful money of Great Britain, or the lawful costs of the said *C.B.*, the Respondent [*or Petitioner*] of and incidental to the hearing and trial of this cause [*or otherwise as in Report*] to the extent of pounds, then this obligation is to be void and of none effect, otherwise to remain in full force and virtue.

Sealed and delivered by the said *A.B.* *A.B.* (L.S.)

G.H., and *K.L.*, in the presence *G.H.* (L.S.)

of *K.L.* (L.S.)

One attesting witness.

TABLE OF FEES

TO BE TAKEN IN

**THE COURT FOR DIVORCE AND
MATRIMONIAL CAUSES..**

WHEREAS by an Act passed in the Session of Parliament holden in the twentieth and twenty-first years of the reign of Her present Majesty, chapter 85, it is provided that there shall be a Court of Record, to be called "The Court for Divorce and Matrimonial Causes;" and whereas by the said Act it is further provided, that the said Court shall have full power to fix and regulate from time to time the Fees payable upon all proceedings before it; and whereas by another Act passed in the Session of Parliament holden in the twenty-third and twenty-fourth years of Her Majesty's reign, chapter 144, it is enacted that it shall be lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes alone to exercise all powers and authority whatever thentofore exercised by the full Court.

Now I, Sir James Plaisted Wilde, Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes, do fix the Fees set forth in the annexed Table to be payable upon proceedings in the said Court for Divorce and Matrimonial Causes on and after the 11th January, 1866.

Dated the 11th January, 1866.

((Signed) JAMES PLAISTED WILDE.

TABLE OF FEES
TO BE TAKEN IN THE
COURT FOR DIVORCE AND MATRIMONIAL
CAUSES.

Citation.

	£	s.	d.
On every citation	0	5	0
For settling citation, or an abstract thereof for advertisement, or other advertisement:			
If five folios of seventy-two words or under	0	2	6
If above five folios for each additional folio or part of a folio	0	0	3

Appearance.

On entering appearance	0	2	6
On amending appearance	0	2	6

Pleadings.

Filing a petition	0	5	0
Filing an answer	0	5	0
Filing a reply	0	5	0
Filing rejoinder or any further replication	0	5	0
Filing act on petition	0	5	0
Filing any writing to the act on petition by way of answer, reply, rejoinder, or conclu- sion	0	5	0
Filing joinder in demurrer	0	5	0
On amending or reforming pleadings	0	2	6

Evidence.

Filing interrogatories (each set)	0	5	0
Filing deposition of each witness	0	2	6

Protection Orders.

	£.	s.	d.
Filing application for an order for the protection of a wife's earnings and property .	0	5	0
For entering the order on such application .	0	5	0
For the order under seal of the Court .	0	10	0

Questions for Jury.

For settling the issues of fact to be tried by a jury	0	10	0
Filing parchment copy of issues of fact as settled	0	2	6
Filing panel	0	2	6

Setting down.

Setting a cause down for hearing or trial .	0	5	0
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Withdrawal.

On withdrawal of a cause after same is set down for hearing or trial, to be paid by the party at whose instance it is withdrawn .	0	5	0
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Subpoena.

On every subpoena	0	2	6
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Hearing or Trial.

On the hearing or trial of a cause :			
From the party setting down the cause for hearing or trial	1	10	0
If the hearing or trial continues more than one day, for each day :			
From the same party	1	0	0

Judge's Notes.

Producing the Judge's notes	0	5	0
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Entering Decree, Verdict, or Order.

Entering sentence or final decree in a cause, to be paid by the successful party	0	10	0
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TABLE OF FEES.

353

	£.	s.	d.
Entering verdict, if five folios of seventy-two words or under	0	5	0
If exceeding five folios, for each additional folio or part of a folio	0	1	0
Entering order for the examination of a witness or witnesses	0	5	0
Entering any decree or order for alimony	0	5	0
Entering order directing how damages shall be applied	0	5	0
Entering order providing for custody, maintenance or education of children, if five folios of seventy-two words or under	0	5	0
Entering any order made under the authority given by 20 & 21 Vict. c. 85, sections 32 and 45 and by 22 and 23 Vict. c. 61, s. 5, if five folios of seventy-two words or under	0	5	0
If either of the above orders exceed five folios, for each additional folio or part of a folio	0	1	0
Entering any minute, order, or decree in the Court Book other than minutes, orders, or decrees specified	0	2	6
Entering any order of the Registrars of the Court of Probate the same fee as would be payable for entering a similar order made by the Judge.			

Orders.

For any order issuing under the hand of the Judge Ordinary or of one or more of the Registrars, except orders made on summons	0	5	0
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Bill of Exceptions.

Bill of exceptions signed by the Judge	0	5	0
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Commission or Requisition.

On every commission or requisition issuing under seal of the Court	1	0	0
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<i>Taking Evidence.</i>	£	s.	d.
For taking the evidence of one or more witnesses before the Registrar, and within three miles of the General Post Office, for each day	3	3	0
If beyond that distance, for each day, in addition to travelling expenses . . .	5	5	0
If for part of a day only, such smaller fee as the Registrar in his discretion shall think proper.			

References to the Registrars.

On each reference to ascertain the amount to be paid or secured to a wife to cover her costs. For the Registrar's attendance . . .	0	5	0
For his report thereon	0	2	6
On each reference for any other inquiry before the Registrars. For Registrar's attendance	1	0	0
For every hour or part of hour after the first hour a further fee of	0	10	0
For the Registrar's report, if five folios of seventy-two words or under	0	5	0
If exceeding five folios, for every additional folio or part of a folio	0	2	0

Summonses.

On each summons	0	2	6
For an order on summons, including the entry of same	0	2	6
If a final order in the cause	0	10	0

Motions.

Filing case for motion	0	5	0
Entering any minute or order on motion other than orders specified	0	5	0
If a final order in the cause	0	10	0

Writs.

Writ of attachment	0	7	6
Writ of sequestration	1	0	0
Writ of fieri facias	1	0	0

TABLE OF FEES.

355

Appeals.

£ s. d.

On lodging instrument of appeal	0	10	0
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Certificate.

For every certificate under the hand of the Judge Ordinary, or of one of the Registrars of the Principal Registry of the Court of Probate

0	2	6
---	---	---

Filing.

Filing every notice	0	1	0
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Filing exhibits, for each exhibit	0	1	0
---	---	---	---

Filing every affidavit or other document brought into Court or deposited in the Registry for filing which no fee is before specified	0	2	6
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Searches.

Search in each Court Book, if within the last five years	0	1	0
--	---	---	---

If at an earlier period than within the last five years	0	2	6
---	---	---	---

In case the Court Books to be searched or the documents required are not in the Registry, in addition to the above	0	2	6
--	---	---	---

Office Copies and Extracts.

For every office copy or extract of a minute, order, or decree entered in a cause, or of any document filed in a cause, or deposited in the Registry :

If five folios of seventy-two words or under	0	2	6
--	---	---	---

If exceeding five folios of seventy-two words, per folio	0	0	6
--	---	---	---

If on parchment, in addition to the above, for every folio and part of a folio of seventy-two words	0	0	3
---	---	---	---

For the seal of the Court affixed to any minute, order, or decree, or to any office copy	0	5	0
--	---	---	---

<i>Taxing Costs.</i>	<i>£</i>	<i>s.</i>	<i>d.</i>
Taxing every bill of costs :			
If five folios of seventy-two words or under	0	2	6
If exceeding five folios of seventy-two words			
When taxed as between party and party, for every folio and part of a folio of seventy-two words	0	0	6
When taxed as between practitioner and client, for every folio and part of a folio of seventy-two words	0	1	0
For postponement of appointment for taxation of costs to be paid by the party at whose instance the appointment is postponed :			
If the bill of costs is five folios of seventy-two words or under	0	1	0
If exceeding five folios of seventy-two words, and under fifteen folios	0	2	6
If exceeding fifteen folios	0	5	0
<i>Appointment of Officers.</i>			
On appointment of a Commissioner for taking oaths	1	0	0
For registering appointment of a Commissioner for taking oaths in the Court of Chancery	0	5	0
<i>Oaths.</i>			
For administering an oath to each deponent	0	1	0
For marking each exhibit	0	1	0

INDEX.

ABATEMENT, of suit by death, 20, 266.

ABSOLUTE BARS, see *Defences in suits for Dissolution*.

ACT ON PETITION, proceedings by, *appendix*, 307, 337.

ADJOURNMENT, 19, 20, *note* 6.

ADULTERY, see *Incestuous adultery*. *Bigamy with adultery*.

how alleged, 63, 64; evidence of, generally, 65, 67; going to a brothel, 66, venereal disease, *ib.*; confession of, 67; evidence of the parties with respect to, 68, 69, evidence of woman with whom committed, 70; with prostitutes, *ib.*, evidence of detectives as to, *ib.* 71; brought about by persons acting for petitioner, *ib.*, *note* 2; of the petitioner as a discretionary bar, 153-160.

AFFIDAVIT, see *Verifying Affidavit*.

evidence by, 16, Rules as to, *appendix*, 307; proof of marriage by, 38; bigamy proved by, 83; woman's evidence in suit of nullity given on, 190, 191; on application respecting custody of children, 271; on motion for new trial, 284, in *note*, 285, *note* 7.

AFFINITY, see *Consanguinity*.

ALIMONY PENDENTE LITE, see *Permanent alimony*.

nature of, 228, 229; wife generally entitled to, 228, *note* 1, procedure on petition for, 229, *note* 2, *appendix*, 312; what property of the husband chargeable with, 230, 231, and deductions allowed by him, 232; amount of, 232, 233; reduction of, 234; refused when wife has means of her own, 234, 235, or when husband has no means, 236; duration of, and how payable, 237, 238, and to whom, 244; payment of, how enforced, 244.

ALTERATION OF PRAYER, 21, *note* 8.

AMENDMENT, by motion, 10, or summons, *ib.* *note* 4, when allowed or ordered, 11, *note* 5; of petition by adding charge of adultery, 64; by fresh charges of cruelty, 86, *note*, 123, *note* 3.

- ANSWER**, time for filing, 10, form of, *appendix*, amendment of, 10, 11, on summons, *ib. note 4*; to petition alleging desertion, 112, *note 4*; denying validity of marriage, 127, *note 2*; to suit of nullity, 218; to suit for restitution of conjugal rights, 223, and *notes*, 224, 225; to suit of jactitation, 227; to petition for alimony, 229, *note 2*.
- APPEALS**, time for, to full Court, 287; procedure in, *ib. note 4, appendix*, 310; to House of Lords, 287, 288; effect of demurrer with respect to, 288.
- APPEARANCE**, how entered, and when, 9, *note 8*, proceeding in default of, 9.
- ASSIZES**, trial of issue at, 14, *notes 8, 9*.
- ATTACHMENT**, *see Enforcement of orders and decrees*.
for contempt of court, 22, 226.
- BIGAMY WITH ADULTERY**, 83.
- CHANGE OF PROCTOR, SOLICITOR, OR ATTORNEY**, *appendix*, 319.
- CHILDREN**, statutable provisions as to custody, maintenance, and education of, 269; discretienary powers of the Court with respect to, 270; custody of, or access to, pending suit, 271; Court may make order for access to, only, 272, father's right to custody of, *ib.*, 273; no actual right of access to on part of wife, 273; orders with respect to, on final decree, 274-276; order for maintenance of, 276; intervention by third persons with respect to custody of, 277, 278; wife guilty of adultery not allowed custody of, or access to, 279; costs of applications respecting, 280.
- CITATION**, to be served with petition, 7, form of, in *appendix*, 333; substitutional service of, 8, by advertisement, *note 4*; return of into Registry, 8, *note 5, 9*.
- COLLUSION**, may be found by the Court, 151, 152, but is more particularly subject of intervention by Queen's Proctor, 152, 153; communication between opposite parties may cause suspicion of, 151, *note 5*, 153, *note 8*.
- COMMISSION**, evidence on, 16, 17, *appendix*, 320.
- COMPROMISE OF SUIT**, 20.
- CONDONATION**, *see Revival*.
definition of, 141, *note 9*, pleading, *ib.*; by husband,

142, 143; by wife, 143, of cruelty, 144; proof of, 145, 146.

CONFLICT OF MARRIAGE LAWS, with respect to marriages of English subjects abroad, 46-49, marriages of foreigners in England, 50; with respect to foreign divorces of English marriages, 51-54.

CONFRONTATION, to prove identity, 71, 72.

CONNIVANCE, doctrine of, 130, *note 4*; to constitute, not necessary to be "accessory" to adultery, 131, *note 5*; evidence of, 132; not readily to be presumed, 133; at one adultery, a bar to relief for subsequent adultery, 134, 135; deed of separation, how far evidence of, 136-141; repeated condonation may be evidence of, 143, *note 147, note 4*.

CONSANGUINITY, OR AFFINITY, nullity of marriage within prohibited degrees of, 216.

CONTEMPT OF COURT, see *Attachment*.

CO-RESPONDENT, adulterer must be made a, 61, 62; when dispensed with, 62, 63; generally condemned in costs, 72, when not, 73-75; petitioner liable to pay costs of, 76, 77; damages claimed against, 79, 80; liable to pay costs of altering marriage-settlement, 268.

COSTS, see *Taxing Bills of Costs*.

of wife pending suit, 14, 15; of adjournment, 20; on dismissal of petition, 20, 77, 78; of interveners, 23, *note 5*; of wife suing as pauper, 27; in suit for dissolution, co-respondent generally condemned in, 72; exceptions, 73-75; petitioner liable to pay, 76, 77; respondent, (wife) liable to pay, 78; of Queen's Proctor, 128; of wife after suit, 178-180; in suit of nullity, when no order made by House of Lords, Court will make no order as to, 198; in suits of nullity generally, 219, 220; in suit for restitution, wife, respondent, condemned in, 226; of orders respecting marriage-settlements, 267; of applications respecting custody of children, 280; of new trial, 287.

COURT, its jurisdiction, whence derived, 1, Judges of the, 2, 3; the Judge Ordinary, his power and authority, 2, 3, in chambers, 4, 5; to make Rules and Regulations, 5,

note 4; sittings of the, time and place of, 45, in *notis*.

CROSS-SUITS, consolidation of, 13; necessity for, partially removed by 29 Vict. c. 32, 177, pleading in, *ib. note 2*.

CRUELTY, see *Judicial separation*.

not to be defined, 84; general principles of, 85-87; how stated in petition, 85, 86, *notes*; denial of necessities and comforts, 88; threats and abusive language, 89, habits of intoxication, 90; cause of, unimportant, 91; committed under influence of insanity, *ib. note 3*, 224; though generally cumulative, one act may suffice, 92; jealousy, a cause of, 93; not constituted by indifference, etc. 94; adultery in the "household," *ib.*, and *note*; venereal disease, 95, how alleged, *ib. note 1*, evidence of, *note 2*, communication of, may be reckless, 96, difficulty of proving, *ib. 97, 98, note 7*; cutaneous complaint, 98, unnatural connexion, *ib. 99*; spitting in the face, 99; violence to children, 101; insulting and degrading conduct, *Kelly v. Kelly*, 101-105; when husband not to blame, 106, provocation by wife, *ib. 107-108*; when committed by wife, 108, 109, by reason of drunkenness, or jealousy, 109; distinction between suits by husband and by wife, 110, 111: Condonation and revival of, 144-149; effect of delay in suits on ground of, 162; as a discretionary bar, 164, 165.

DAMAGES, must be awarded by a jury, 12; principles on which claimed and assessed, 79, *note 1*, evidence on claim for, *ib.*, 80, *note 3*; how recovered, 81; adding or abandoning claim for, 82; verdict with respect to, reversed, 129, 130, *note 2*; settlement of, as provision for wife or children, 248-251, when paid to petitioner, 252.

DEBTORS' ACT, 32 & 33 Vict. c. 62, how far attachment abolished by, 21; Rules under, *appendix*, 329.

DECREES NISI AND ABSOLUTE, 22, 23.

DECREE ABSOLUTE, application for, 23, *note 6, appendix*, 311; rules as to showing cause against, *ib. 310*.

DEFENCES IN SUITS FOR DISSOLUTION OF MARRIAGE, see *Connivance. Condonation. Collusion. Petitioner's adultery*.

Unreasonable delay. Desertion or Wilful separation.
Wilful neglect or misconduct.
 statutable provisions as to, 125-127.

DEMURRER, 11, effect of, with respect to appeals, 288.

DESERTION, see *Judicial Separation*.

allegation of, answer to, and evidence, 112, *note* 4;
 not to be strictly defined, observations of Lord Pen-
 zance, 113; to be construed by the intent, 114; must
 be against the will of the wife, 116; not constituted
 by absence from necessity, 117; consistent with making
 wife an allowance, 118; neglect and infidelity, *ib.*;
 may be effected by misconduct, 119; *not* by deed of
 separation, or agreement to live apart, 120, 122, 123,
 or by merely holding aloof, 121, remarks of Lord
 Penzance, 122; right to sue on account of, having
 accrued, not barred by offer to return, 123; reasonable
 excuse for, 170: as a discretionary bar, 165, 166. See
Wilful separation.

DETECTIVES, employment of, objectionable, 70, 71, *note* 2.

DISCRETIONARY BARS, see *Defences in Suits for dissolution*.

DISSOLUTION OF MARRIAGE, see *Adultery. Bigamy. Cruelty.*

Desertion. Incestuous adultery. Rape. Sodomy.

grounds of suit for, by husband, by wife, 60, difference
 between suits, 61; husband's suit, co-respondent, *ib.*,
 62, when dispensed with, *ib.*, 63; alleging adultery,
 63, 64, amending petition, *ib.*, *note* 3, evidence of
 adultery, 65-70, of identity, 71, 72; co-respondent
 generally condemned in costs, 72, when not, 73-75;
 petitioner liable to pay, 76; respondent liable to pay
 78; damages, how assessed, 79, 80; how recovered,
 81, adding or abandoning claim for, 82: wife's suit,
 incestuous adultery, 82, bigamy with adultery, 83,
 rape, *ib.*, cruelty, 84-108; desertion, 112-124.

DISMISSION OF PETITION, application to Court for, 20, 77; by
 the Court, 125; costs incidental to, 77, 78.

DOMICIL, as affecting the validity of marriage, 46, 47; as
 affecting the right to sue, and the jurisdiction of the
 Court, 54-59.

ECCLESIASTICAL COURTS, jurisdiction of, transferred to the

Divorce Court, 1; in what suits their principles to be acted on, 2.

ENFORCEMENT OF ORDERS AND DECREES, 21, 22, see *Attachment. Debtor's Act. Sequestration.*

EVIDENCE, by affidavit, 16, *appendix*, 307; on commission, 16, 17, *appendix*, 320; Rules of, 19; of marriage, 38-41; of adultery, 65-67, by the parties to the suit, 68, by woman with whom adultery committed, 70, of prostitutes, *ib.*, of detectives, *ib.*; of identity, 71, by photographs, *ib.*, by confrontation, *ib.*, 72; in respect of claim for damages, 79, *note* 1, 80, *note* 3; to establish bigamy, 83; rape, *ib.*; cruelty, 85, *note* 9, and *passim* under head of cruelty, 84-111; of desertion, 112, *note* 4, and *passim* under head of desertion, 112-124; of connivance, 132, 133, 136-140; of condonation, 142, 143, 145; of collusion, 151-153; in suits of nullity, 184, 185, 215; in suit for restitution of conjugal rights, 223; on petition for alimony, 230, *note*; in applications respecting custody of children, 271.

FULL COURT, all its powers vested in the Judge Ordinary, 3; its sittings, 4; its functions, 3; appeal to, on motion for new trial, 283, 284, *in notis*; appeal to, on other matters, 287, 288; procedure on appeals to, 287, *in notis*; Rules as to appeals, *Appendix*, 310; Form, *Appendix*, 339.

IDENTITY OF PARTIES, how proved, 71.

IMPOTENCY, see *Malformation.*

general requisites to sustain suit on ground of, 182, distinction between suits by man and woman, *ib.*, *note* 2, 183, *note* 4, 184; means of proving, 184, 185; (inspectors, how appointed, 185, 204) of the man, requisites for woman's suit on account of, 185; Rule of three years' cohabitation as proof of, 184, 186, 187, 191; *quoad hanc*, 188; evidence of the parties with respect to, 185, 189, 192; masturbation, as proof of, 190, *note* 7; effect of delay in suits of, 194-198.

INCESTUOUS ADULTERY, 82.

INSANITY, degree of, to invalidate marriage, 214; evidence to

support suit on ground of, 215; procedure in suit on ground of, *ib.*, note 7; cruelty committed under influence of, 91, 224.

INSPECTION OF DOCUMENTS OR LETTERS, 18.

INSPECTORS, in suits of nullity, how appointed, 185, 204.

INTERVENTION, see *Queen's Proctor*.

by third persons wishing to show cause against decree, 22, 23, note 5, *appendix*, 310; with respect to custody of children, 277-279.

JACTITATION OF MARRIAGE, nature of suit, 227; when brought into disrepute, *ib.*, note 5; seems no longer practised, *ib.*, note 5.

JUDICIAL SEPARATION, decree of, substituted for divorce *a mens et toro*, 2; grounds of petition for, 60, note 3, 61.

LEGITIMACY DECLARATION ACT, procedure under, 291-295.

LUNATICS, see *Insanity*. Suits by and against, 24, 25; marriage of, null and void, 215.

MALFORMATION, see *Impotency*.

in woman, suit by man on account of, 199; effect of delay, *ib.*, 200; requisites to sustain suit, 201; ages of parties to suit on account of, to be considered, 201-203; difficulty of proving, where woman refuses to undergo inspection, 203, 204, note 3.

MARRIAGE, see *Dissolution of Marriage*. *Nullity under Marriage Acts*. *Jactitation of Marriage*.

fact of, essential to a matrimonial suit, 29; in England, who may contract, *ib.*, by banns, 30, by licence, 31, time and place of celebrating, 32; by registrar's certificate, 33, by registrar's licence, 34, where and when to take place, 35; of minors, 36, note 4; registration of, 37; proof of, 38, by affidavit, *ib.*, note 7, when celebrated abroad, 39, 40, in British Colonies, 41, in India, 42, 43; of British subjects in foreign countries, 43-46, validity of, may depend upon the law of their domicil, 47, 48; in a country allowing polygamy, 49; of foreigners in England, 50; foreign divorce of English, 51-54; of persons whose former marriage has been dissolved, 289, note 8, 290.

MARRIAGE SETTLEMENTS, see *Settlement of property*.

power of the Court to deal with, under S. 5 of 22 & 23

Vict. c. 61, 255; procedure with respect to, *ib.*, *note* 2, *appendix*, 314; can only be dealt with where issue living, 258; separation deed may be dealt with as a, *ib.*; principles on which the Court deals with, 259-261; alteration of, in favour of husband, petitioner, 262, remarks of Lord Penzance, 263; order with respect to, not retrospective, 264; how dealt with, when marriage dissolved at suit of wife, 265; when dealt with, after death of petitioner, 266; costs of application to vary, 267.

MINORS, suits by and against, 24, *appendix*, 315; marriages of, 86.

MODE OF TRIAL, application to direct, 9, 12, 13, *appendix*, 305.

MOTION, cases for, rules as to, *appendix*, 323.

NEW TRIAL, grounds of application for, 283; procedure in applications for, 283, 284, *in notis*; reasons for granting or refusing, 284, on ground of fresh evidence, 285, where two issues raised, *ib.*, in case of discretionary bar, 286, in case of inconsistent verdict, *ib.*; costs of, 287.

NOTICES, &c., service of, *appendix*, 317.

NULLITY OF MARRIAGE, see *Impotency*. *Nullity under Marriage Acts*. *Insanity*. *Consanguinity*. *Prior marriage*. grounds of suit for, 181; distinction between suits for, in respect of void or voidable marriages, 181, 182; defences in suits for, 218; costs in suits for, 219; when suit for restitution may take form of, 226.

NULLITY UNDER MARRIAGE ACTS, by reason of undue publication of banns, 205, 206; suit for, by whom instituted, 206, *note* 6; evidence of, 207; by suppressing christian name, 207-209; by addition of name, 209; by alteration of surname, 209-211; distinction in suits of, between banns and licence, 211, 212; by reason of informality of notice of marriage before Registrar, 213.

OFFICE COPIES, rules as to, *appendix*, 318.

PARTICULARS, application for must be on summons, 10, *note* 4, 86.

PAUPERS. Suits *in formâ pauperis*, 25, 26, *appendix*, 302.

PERMANENT ALIMONY, see *Alimony pendente lite*.

at what rate allotted, 238; never more than one moiety

of joint income, 239 ; examples of, *ib.*, *note* 6, 240, 241 ; Court in allotting, will consider husband's conduct, 241 ; on professional incomes, 242 ; in cases of separation at suit of husband, 242 ; increase or reduction of, 243 ; to whom payable, and how enforced, 244.

PERMANENT PROVISION ON DECREE OF DISSOLUTION, see *Damages, settlement of.*

procedure in respect to, under s. 32 of Divorce Act, 245, *appendix*, 314 ; considerations respecting, where wife is petitioner, 246, 247 ; where husband is petitioner, 248.

PETITION, proceedings commenced by filing, 6, form of, *appendix*, 332, service of, 7 ; substitutional service of, 8 ; amendment of, 10, 11, *note* 5, in cases of adultery, 64, not readily allowed where cruelty alleged, 86.

PETITIONER liable to pay costs of co-respondent, 76, 77.

PETITIONER'S ADULTERY generally a bar, 153-155 ; single act may suffice, 155 ; need not have conducted to adultery of respondent, *ib.* ; effect of condonation, 156, 157 ; cases in which decree pronounced notwithstanding, 158, 159 ; alleged after decree *nisi* by Queen's Proctor, 159, 160.

PHOTOGRAPHS, when useful, when not, 71.

PLEADINGS, general rules as to, *appendix*, 304.

PRIOR MARRIAGE, nullity of marriage by reason of, 217.

PROCEDURE, view of the general procedure in a suit, 6 to 23 ; by minors, lunatics, paupers, 24 to 27 ; by deserted woman to obtain protection order, 27.

PROPERTY, see *Settlement of property.*

PROSTITUTES, evidence of, 70.

PROSTITUTION, wife leading life of, 71, *note* 2.

PROTECTION ORDERS, 27, 28, *appendix*, 319, 345.

PROVISION FOR WIFE, see *Alimony pendente lite. Permanent alimony. Permanent provision. Damages, settlement of.*

QUEEN'S PROCTOR, intervention by, 22, 23, 127, costs of, 128, *note* 7 ; when he may intervene, 129 ; result of intervention by, *ib.*, pleading by, *ib.* *note* 9.

QUESTIONS FOR JURY, how settled, 12, *appendix*, 305 ; technical distinction at trial, 69.

RAPE, 88.

REGISTRARS, general duties of, 5, 6; powers of, in absence of Judge Ordinary, 8, 9; taxation of costs by, pending suit, 14, 15, *in notis. see Taxing Bills of Costs.*

REPLY, time for, 10; *appendix*, 303; form of, *appendix*, 336.

RESPONDENT (wife) liable to be condemned in costs, 78.

RESTITUTION OF CONJUGAL RIGHTS, foundation of suit for, 221; favoured by the Court, *ib.*; Rules as to, *appendix*, 327; suit for, not sustainable by petitioner guilty of adultery, 222; evidence in, 228; defences to, 223, 224; respondent may pray for judicial separation, 224; evidence in support of answer, 225; deed of separation, no bar, 225, *note 5*: enforcement of decree for, by attachment, by sequestration, 226, 227: cannot be prayed for as a "relief" for desertion under 29 Vict. c. 32, s. 2, 177.

REVERSAL OF DECREE OF JUDICIAL SEPARATION, petition for, under s. 28 of Divorce Act, 281, procedure with respect to, *appendix*, 308; case of, 282.

REVIVAL of condoned adultery by subsequent adultery, 147, and *note 5*, by improprieties, 69, 147, *note 4*; of condoned cruelty by violence, 147, or threats, 148, effect of suit for restitution, *ib.*, *note 7*; of adultery by cruelty, 149, 150; of incestuous adultery by ordinary adultery, 82, 150, 151. See *Condonation.*

RIGHT TO BEGIN, 18, 19, *note 3.*

RIGHT TO MARRY AGAIN, 289.

RULES AND REGULATIONS, power of the Judge Ordinary to make and alter, 5, *note 4.*

SEPARATION, DEED OF, see *Connivance. Desertion. Restitution of Conjugal Rights.*

SEQUESTRATION, see *Enforcement of orders and decrees.*

decree in suit for restitution, enforced by, 227; payment of alimony, enforced by, 244.

SETTLEMENT OF PROPERTY, TO WHICH WIFE ENTITLED IN POSSESSION OR REVERSION, see *Marriage settlements.* statutable provisions with respect to, 254; mode of procedure with respect to, 255, *note 2*; construction put upon s. 45 of Divorce Act, and cases under, 256-258.

SODOMY, 84.

SUBPŒNAS, Rules as to, *appendix*, 316, 328, Forms of, 343, 344; Forms of *præcipe* for, 343, 345.

SUMMONSES, Rules as to, *appendix*, 325.

TAXING BILLS OF COSTS, rules as to, *appendix*, 323, 324, 328.

TRIAL, setting down cause for, 18, *appendix*, 306; list of cases for, 18, *note* 2; of cause out of its turn, *ib.*

UNREASONABLE DELAY, nature of, as a bar, 160; in suits for judicial separation, 161, in cases of cruelty, 162-164; effect of, in suits of nullity, 194, 199.

VENEREAL DISEASE, see *Adultery. Cruelty.*

as evidence of adultery, 56; communication of, as an act of cruelty, 95-98.

VERIFYING AFFIDAVIT, to be filed with petition, 6, form of, 7, *appendix*, 333; when to be filed with answer, 10; with petition under Legitimacy Declaration Act, 292, *note*.

WILFUL NEGLECT OR MISCONDUCT CONDUCTING TO ADULTERY, must be in the marital capacity, 170, 171; not constituted by mere carelessness, 172, 173; must be such as to have brought about the wife's fall, 174; observations of Lord Penzance, 174, 175; when applicable to cases of judicial separation, 175, 176; effect upon doctrine of *compensatio criminis*, 177, *note* 1.

WILFUL SEPARATION WITHOUT REASONABLE EXCUSE, see *Desertion*. Nature of, as a bar, 167, though wilful, may have been reasonable, 168, or for some good purpose, *ib.* 169; what may be "reasonable excuse," 170.

WITNESSES, see *Subpœnas*.

intimidation of, how punishable, 22; parties to suit instituted in consequence of adultery, competent, 18, 68; not bound to answer questions as to their alleged adultery, 70; commissions and requisitions for examination of, 17, *appendix*, 320.

